SUPREME COURT, U.S.
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No. 01-

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Utah Supreme Court, in direct contravention of this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and fundamental principles of due process, committed constitutional error by reinstating a $145 million punitive damage award that punishes out-of-state conduct, is 145 times greater than the compensatory damages in the case, and is based upon the defendant's alleged business practices nationwide over a twenty year period, which were unrelated and dissimilar to the conduct by the defendant that gave rise to the plaintiffs' claims?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner State Farm Mutual Automobile Insurance Company is a mutual insurance company. It has no parent company.

Respondents Curtis B. Campbell and Inez Preece Campbell are individuals. Mr. Campbell died following the Utah Supreme Court's decision. A motion to substitute Inez Preece Campbell as proposed representative of his estate has been filed with the Utah Supreme Court. No substitution has been made as of the date of the filing of the instant petition.

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Petitioner State Farm Mutual Automobile Insurance Company ("State Farm") respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINIONS BELOW

The opinion of the Third Judicial District Court of Salt Lake County, State of Utah (99a-166a) has not been officially reported. The opinion of the Utah Supreme Court (1a-98a), which is available at 2001 WL 1246676, is not yet officially reported.

STATEMENT OF JURISDICTION

The judgment of the Utah Supreme Court was entered on October 19, 2001, and State Farm's timely petition for rehearing was denied on December 4, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Plaintiffs Curtis and Inez Campbell's action against Petitioner State Farm arose from State Farm's handling of claims asserted by third parties against its insured, Mr. Campbell, based upon his involvement in a 1981 automobile accident. In that accident, one person, Todd Ospital, died, and another, Robert Slusher, was injured. Mr. Campbell asserted that he was not at fault for the accident. State Farm decided to contest liability and therefore declined to settle the claims of Slusher and Ospital's estate ("Ospital") against Mr. Campbell within the limits of Mr. Campbell's insurance policy.

Slusher sued both Mr. Campbell and Ospital. Ospital in turn asserted a cross-claim against Mr. Campbell. Before trial, Slusher settled his claims against Ospital for $65,000 (half the limits of Ospital's two insurance policies) on the express condition that Ospital assist Slusher both in pursuing his claim against Mr. Campbell and (in the event of an excess verdict) in bringing a subsequent insurance bad faith action

against State Farm. At trial, the jury found Mr. Campbell to be 100% at fault in the accident and judgments were entered against him totaling $186,000, which exceeded his policy limit of $50,000 ($25,000 per claimant). Consistent with Mr. Campbell's request, State Farm appealed the judgments against him. Those judgments were never executed upon and were paid in full by State Farm after they were affirmed on appeal.

Mr. and Mrs. Campbell, represented by the attorneys for Ospital and Slusher, subsequently sued State Farm, alleging a bad-faith failure to settle. The trial of the Campbells' claims against State Farm was conducted in two phases. The jury in the first phase determined that there had been a substantial likelihood that the underlying action against Mr. Campbell would result in excess judgments against him and that State Farm's decision to go to trial instead of settling was unreasonable. The second phase was to determine State Farm's liability for fraud and intentional infliction of emotional distress, and compensatory and punitive damages. The trial court referred to the second phase as the Campbells' "institutional" case against State Farm. (110a, 156a, 158a)

Before the second phase of the trial, State Farm made *in limine* motions to exclude the massive amounts of "expert" and other testimony proffered by plaintiffs regarding various alleged State Farm "patterns and practices" nationwide. State Farm sought to exclude evidence of conduct that was not similar to the conduct involved in the handling of the third-party claims against Mr. Campbell[1] and conduct that occurred outside Utah. After the trial court denied nearly all of those motions, State Farm moved for reconsideration based upon this Court's then newly issued decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). State

[1] In the insurance context, third-party claims are claims against an insured or insurer by persons who are not parties to the insurance contract. In contrast, first-party claims are claims by an insured for contractual benefits under his or her insurance policy, such as for payment for repair of damage to the insured's own vehicle. This distinction is significant because an insurer's obligations to its insureds under first-party contracts are far different from its obligations to its insureds for third-party claims. *See infra* n.9.

Farm argued, *inter alia*, that under *BMW* it would be improper as a constitutional matter for the jury to punish State Farm for out-of-state conduct that was not similar to State Farm's refusal to settle the third-party claims against Mr. Campbell. (168a-172a, 185a-188a) The trial court denied State Farm's reconsideration motion. (189a, 194a)

In his opening statement in the second phase of the trial, plaintiffs' counsel urged the jury to impose punitive damages on State Farm for its nationwide conduct. Plaintiffs' counsel told the jury that this case "transcends the Campbell file" and "involves a nationwide practice." Plaintiffs' counsel emphasized to the jurors that they were "going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages."

At trial, plaintiffs contended that State Farm's handling of the Campbell case was part of a purported nationwide "scheme" by State Farm "to meet corporate fiscal goals by capping payouts on claims company wide," a scheme plaintiffs denominated the "Performance, Planning and Review" or "PP&R scheme."[2] (6a; *see also* 18a) Even assuming such a scheme existed, it would by the sheer breadth of its description capture myriad aspects of corporate conduct, including conduct bearing no similarity to the specific conduct supporting plaintiffs' claims, entirely lawful corporate conduct, as well as conduct occurring outside Utah and affecting only residents of states other than Utah. Indeed, under the rubric of the alleged "PP&R scheme," plaintiffs were allowed to introduce wide-ranging evidence of State Farm's disparate business practices and conduct nationwide, as well as conduct by State Farm affiliates that were separate legal entities

[2] Plaintiffs took the term "Performance, Planning and Review" from State Farm's personnel evaluation program. This program was a "management by objective" program, a widely used method of personnel management. Under this program, various goals (ranging from spending less time on personal phone calls to responding more quickly to customer complaints) were set for each State Farm employee and recorded in the employee's file. For a period of time, State Farm's PP&R manual listed among possible goals the reduction of average claims paid. Before the trial of this case, State Farm had revised its manual to eliminate such goals and had ended their use in employees' PP&R forms.

from State Farm, over a period of twenty years.[3]

Plaintiffs' evidence of State Farm's purported nationwide conduct included such matters as the company's specification of non-original equipment manufacturer (non-OEM) parts for repair of its insureds' automobiles; "first contact" settlements (settlements reached at the first meeting between the adjuster and the insured); the use of appearance allowances for hail damage claims in Colorado; deductions for depreciation and betterment on property damage claims; the use of market surveys when settling total loss claims; the use of independent medical examiner doctors in Arizona, Texas, and Hawaii; the use of a high-low settlement agreement in a California arbitration; the practices of an entirely different State Farm company in evaluating earthquake damage to its insureds' houses in California; and the prospective cancellation by that same company of hurricane insurance coverage for 62,000 Florida homeowners. Plaintiffs made no showing that these discrete and separate practices were unlawful in the states where they occurred. Moreover, *none* of these practices had any connection to the specific conduct at issue in the Campbells' claims.

Furthermore, although the Campbells made no claim that State Farm had discriminated against them, plaintiffs were allowed to introduce evidence regarding State Farm's purported discrimination against the elderly, women, newlyweds, the poor, and racial and ethnic minorities. In addition, plaintiffs presented evidence regarding State Farm's purported nationwide use of "mad dog defense tactics" and purported harassment of witnesses. Plaintiffs failed to show, however, that any such alleged tactics were used in the litigation of the third-party claims against Mr. Campbell.

Plaintiffs also introduced evidence of unsubstantiated allegations of wrongdoing in sixteen class actions against State Farm in Pennsylvania, Texas, Louisiana, California, Arkansas, Illinois, Arizona, Michigan, Alabama, Georgia, Tennes-

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[3] Plaintiffs' expert, Steven Prater, through whom much of plaintiffs' evidence of State Farm's conduct outside of Utah was introduced, told the jury that "this case is . . . about State Farm's pattern and practice nationwide. . . . The case is about more than what happened in Utah, is my point. That's why I'm here talking about all this other stuff."

see and Washington. None of these cases involved allegations similar to the Campbells' allegations of bad-faith failure to settle third-party claims. In addition, plaintiffs presented evidence about individual lawsuits in other jurisdictions that had no relevance or connection to the Campbells' case. For example, plaintiffs introduced evidence regarding a $100 million punitive damages jury verdict in a Texas case involving a first-party claim for underinsured motorist coverage. Not only was judgment never entered on the Texas punitive award, but the substantive basis of the Texas case had no factual or legal similarity to the Campbells' case.

These massive amounts of testimony and other evidence regarding dissimilar and unrelated conduct overwhelmed plaintiffs' evidence that actually pertained to the alleged bad-faith failure to settle the third-party claims against Mr. Campbell.[4] Moreover, plaintiffs presented almost no evidence at trial of other instances of alleged bad-faith failure by State Farm to settle third-party claims within the insured's policy limits. In fact, State Farm's undisputed evidence regarding the company's handling of claims like those against Mr. Campbell, showed that from 1980 through 1994 State Farm handled 29,497 such claims in Utah. Of these claims, 26,486 were settled without a lawsuit being filed, and only 438 claims were tried to a verdict, the remainder being settled or dismissed. Of the 438 claims that were tried to a verdict, 396 (or 90%) resulted in a finding of no liability for the insured or a verdict lower than State Farm's highest settlement offer. Only seven claims resulted in excess verdicts, and State Farm

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[4] Plaintiffs' evidence that specifically related to State Farm's handling of the third-party claims against Mr. Campbell included testimony that State Farm disregarded the strength of the third-party claims against Mr. Campbell and concealed from Mr. Campbell the likelihood of an excess verdict; testimony by a former claims adjuster that he was told to alter the Campbell file to change his evaluation of liability and to include the statement that Todd Ospital was speeding on his way to visit a pregnant girlfriend; testimony that the attorney hired by State Farm to defend Mr. Campbell told Mr. Campbell after the verdict to put a for-sale sign on his house; and evidence that upon appeal of the underlying judgments State Farm did not post bond to protect the Campbells from the possibility of execution on the excess verdict, even though State Farm paid the entire judgments against Mr. Campbell shortly after they were affirmed on appeal.

resolved all seven cases so that its insureds personally paid nothing. It is indisputable that Mr. Campbell was the only Utah insured who was exposed even briefly to a threat of execution on an excess verdict because of a refusal by State Farm to settle within policy limits.

The jury in the second phase of the trial rendered a verdict for plaintiffs, awarding $1.4 million and $1.2 million in emotional distress damages to Mr. and Mrs. Campbell respectively, $911.25 for the Campbells' out-of-pocket legal expenses, and $145 million in punitive damages. State Farm moved for remittitur of the compensatory and punitive damage awards. State Farm argued that the punitive award was unconstitutionally excessive because it punished extraterritorial and dissimilar conduct and was contrary to the guideposts set forth in *BMW*. The trial court remitted the emotional distress damages to $1 million in total and remitted the $145 million punitive award to $25 million. (1a-2a, 166a)

State Farm appealed the entire judgment against it, and plaintiffs cross-appealed the trial court's remittitur of the $145 million punitive award. On appeal, State Farm argued, *inter alia*, that both the remitted $25 million punitive award and the jury's $145 million punitive award were unconstitutionally excessive because they were predicated on out-of-state and dissimilar conduct and inconsistent with the *BMW* guideposts. In its decision, the Utah Supreme Court reinstated the $145 million punitive award, which is 145 times greater than the $1 million compensatory damages in this case. In reinstating the award, the Utah Supreme Court relied extensively upon State Farm's purported twenty-year nationwide "scheme" and specific instances of conduct that were plainly extraterritorial (i.e., outside Utah) and dissimilar to State Farm's conduct in the Campbells' case. The Court pointed to State Farm's alleged nationwide "PP&R scheme" or what it termed State Farm's "consistent way of doing business for the last twenty years, directed specifically at some of society's most vulnerable groups" (34a); State Farm's purported discrimination against the "poor racial or ethnic minorities, women, and elderly individuals" (19a); an investigative report on a former employee of a separate State Farm company in California that had no connection to this or any other Utah litigation (19a); and many other matters entirely

unconnected and dissimilar to the handling of the third-party claims against Mr. Campbell. The Court also stated that State Farm's "enormous" wealth and the $100 million Texas punitive award -- which was never reduced to judgment -- showed that an extremely large punitive award was necessary to get State Farm's attention. (17a, 30a) The Court denied State Farm's motion for rehearing on December 4, 2001. (195a)

REASONS FOR GRANTING THE WRIT

The Utah Supreme Court's decision conflicts with this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), which proscribes punishment of extraterritorial conduct. In addition, the Utah Supreme Court's decision puts in question the constitutionality of permitting individual plaintiffs in a civil case to seek to punish a corporate defendant for a wide array of business activities over a twenty-year period that were dissimilar to the specific conduct about which the plaintiffs complain.

In reinstating the $145 million punitive award,[5] the Utah Supreme Court contravened the constitutional due process prohibition set forth by this Court in *BMW* against punishment of extraterritorial conduct. The Utah Supreme Court did not simply consider evidence of similar out-of-state conduct in assessing the reprehensibility of State Farm's conduct toward plaintiffs, as might have been permissible under *BMW*. Rather, it is clear from the Court's decision and the huge size of the punitive award that the Court punished not only State Farm's conduct toward the Campbells, but also a wide range of unrelated, dissimilar, and out-of-state conduct. Indeed, to support the punitive award, the Court cited as worthy of punishment a purported twenty-year nationwide "scheme" by State Farm to underpay insurance claims. This "scheme" was purportedly carried out through a variety of different nationwide practices that plaintiffs did not show to be unlawful in the states where they occurred. In fact, many of those practices were clearly lawful in most states.

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[5] The total current value of the punitive damage award, including the interest that has accrued since the award was rendered in 1996, is in excess of $200 million.

The Utah Supreme Court's reinstatement of the enormous punitive award based upon State Farm's conduct nationwide is even more egregious than the attempted punishment of extraterritorial conduct disapproved of by this Court in *BMW*. In *BMW*, the extraterritorial conduct at issue was substantially identical to the defendant's conduct toward the plaintiff. In contrast, the Utah Supreme Court relied upon the notion of a generalized nationwide "scheme" to punish conduct and practices that bore no similarity to the specific conduct at issue. Evidence of the alleged all-encompassing "scheme" ranged from State Farm's specification of non-OEM parts for the repair of its insureds' automobiles, to the prospective cancellation of hurricane insurance in Florida, to State Farm's purported discrimination against racial minorities and other vulnerable groups – none of which was at issue in this case or in any way similar to State Farm's conduct toward the Campbells. The Utah Supreme Court's punishment of dissimilar and unrelated conduct, both inside and outside of Utah, contravened the basic due process principle articulated by this Court in *BMW* that a punitive award must be reasonable in relation to the defendant's conduct toward the plaintiffs.

The "scheme" analysis relied upon by the Utah Supreme Court is predicated on a definition of "pattern" or "scheme" so generalized and broad in scope as to bring within its purview virtually any activity engaged in by a corporation in conducting its business. If permitted to stand as precedent, the Utah Supreme Court's decision could be construed to authorize a roving inquiry into a corporate defendant's nationwide business practices and conduct over decades whenever a plaintiff claims that the defendant's particular conduct toward him or her was part of an improper "pattern" or "scheme." Such an unbounded expansion of the punitive damages inquiry, untethered to the claims at issue, impermissibly intrudes on state sovereignty and comity, impairs interstate commerce, and threatens to bludgeon corporations and businesses nationwide with vast and repetitive punitive awards. This result is directly contrary to the constitutional principles set forth by this Court in *BMW* and other decisions.

The Utah Supreme Court also impermissibly distorted the three guideposts identified in *BMW* for determining whether

a punitive damage award is unconstitutionally excessive. The extreme 145 to 1 ratio of punitive to compensatory damages, for example, was upheld on the basis of factors that had no relevance whatsoever to State Farm's alleged bad-faith conduct in handling the claims against Mr. Campbell. Similarly, in analyzing the guidepost of reprehensibility, the Court improperly relied upon the reprehensibility of dissimilar conduct not at issue in the plaintiffs' claims against State Farm. So, too, with respect to the third guidepost – civil and criminal penalties for comparable conduct – the Court incorrectly based its analysis upon a whole range of multiple penalties applicable to the alleged comprehensive "scheme," but in no way similar to the specific misconduct at issue. The Court's analysis stripped the *BMW* guideposts of all meaningful constraining force upon the size of punitive damage awards, so as to allow civil litigants in a single case to obtain a staggering award of punitive damages for conduct that was unrelated to their claims and which did not affect them.

The Utah Supreme Court's decision thus raises important questions as to the constitutional propriety of using an individual civil litigation as a vehicle to punish conduct (whether in or out of state) that is dissimilar to the conduct that is the basis of plaintiffs' claims for compensatory damages. This Court has indicated that if a defendant's conduct toward the plaintiffs is part of a pattern of *similar* repeated conduct, a higher punitive damage award may be constitutionally permissible. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 & n.28 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991); *BMW*, 517 U.S. at 577. The principle recognized by this Court is that the existence of similar conduct may shed light on the degree of reprehensibility of the conduct at issue. *Id.* However, nothing in this Court's decisions suggests that due process permits a court or jury to reach out to impose a large punitive sanction against conduct by a defendant that is dissimilar and unrelated to the conduct directed toward the plaintiff. State Farm submits that the $145 million punitive award reinstated by the Utah Supreme Court, primarily on the basis of extraterritorial and dissimilar conduct, is beyond the legitimate scope of Utah's interests in punishment and deterrence and grossly excessive as a matter of due process. For these reasons and those set forth below, State Farm respectfully sub-

mits that this Court should grant certiorari.

I. The Utah Supreme Court's Reinstatement of the $145 Million Punitive Award Impermissibly Punishes Out-of-State and Dissimilar Conduct, in Direct Contravention of *BMW v. Gore*

BMW makes clear that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW*, 517 U.S. at 568. This Court held that, as a matter of sovereignty and comity and of due process, "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," *id.* at 572, and that a punitive award "must be analyzed in light of [conduct within the State], with consideration given only to the interests of [the State's] consumers." *Id.* at 574. Due process requires that a punitive award must be reasonably related to a State's interest in deterring and punishing unlawful conduct within its borders. *Id.* at 568.

The Utah Supreme Court's punishment of out-of-state conduct in this case went far beyond the punishment of extraterritorial conduct that this Court held constitutionally impermissible in *BMW*. All of the instances of out-of-state conduct at issue in *BMW* were substantially identical to the defendant's failure to disclose the pre-sale repair of the plaintiff's car. *Id.* at 563-64. In contrast, the Utah Supreme Court found punishable in this case an entire range of conduct over twenty years that was unrelated and dissimilar to the specific conduct giving rise to plaintiffs' claims.

Despite its professed goal of protecting Utah consumers, the Utah Supreme Court plainly intended its reinstatement of the $145 million punitive award not merely to punish State Farm for its conduct in the present case, but also to remedy "the harmful effect" of State Farm's conduct nationwide over two decades "on the larger community of all those who deal with the company." (21a; *see also* 6a) In its decision, the Court relies heavily on dissimilar conduct and conduct that indisputably occurred beyond the borders of Utah. For example, the Court emphatically reiterates as a basis for the $145 punitive award the trial court's finding that "State Farm's fraudulent practices were consistently directed to persons –

poor racial or ethnic minorities, women, and elderly individuals – who State Farm believed would be less likely to object or take legal action." (18a-19a; *see also* 20a, 34a) The evidence for this charge centered on testimony by two former employees: Ina DeLong, a former employee of State Farm Fire and Casualty Insurance Company ("State Farm Fire"), who handled homeowners' first-party earthquake damage claims and other property damage claims in California and who never worked for State Farm Mutual Automobile Insurance Company (the defendant in this case) in Utah or elsewhere; and Bruce Davis, whose employment with State Farm had ended in 1984, and who testified about the specification of non-OEM automobile repair parts and the handling of claims for hail damage to motor homes in Colorado. There was no evidence of any consistent policy or practice of discrimination in Utah.[6] Indeed, plaintiffs' own witness, Samantha Bird, who worked as a claims adjuster and claims superintendent for State Farm in Utah from 1980 to 1991, testified that she never treated insureds differently because of age, race or gender, was never instructed to do so, and never trained others to do so. Moreover, the Campbells themselves never claimed, and introduced no evidence to show, that they were treated differently because of race, age, gender, or financial condition.

The Utah Supreme Court's reliance on extraterritorial and dissimilar conduct was not confined to alleged acts of discrimination. In reinstating the $145 million punitive award, the Court emphasized the trial court's findings that "State Farm has systematically harassed and intimidated opposing claimants, witnesses, and attorneys" and employed "mad dog defense tactics." (19a) Just as with the purported evidence of discrimination, the testimony did not show harassment or intimidation that occurred in Utah or in connection with this case. Indeed, the only evidence of harassment or intimida-

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[6] The evidence of conduct directed toward racial minorities or vulnerable persons in Utah was the testimony by former State Farm claims adjuster Ray Summers that one of his supervisors had sometimes made derogatory comments about minorities and that, in a case where a "vulnerable" young man had attempted to commit suicide by deliberately colliding with an oncoming car, Summers was instructed to deny coverage on the ground that the conduct was intentional.

tion specifically discussed by the Court (19a) was evidence of conduct that occurred in California and had no connection to the present case or indeed to any litigation. That evidence consisted of the testimony of plaintiffs' witness Ina DeLong, who, as noted above, was a former employee of State Farm Fire in California. DeLong testified that State Farm investigated her personal life shortly before she resigned from the company and again when she went to the newspapers with accusations regarding State Farm's handling of earthquake damage claims in California. That investigation was aimed at possible conflicts of interest arising out of DeLong's relationship with a contractor who did earthquake repairs and had given DeLong a color TV. The investigative report on DeLong had nothing to do with this case or Utah. The imposition of punitive damages based upon this conduct, therefore, does not serve any legitimate Utah interest in regulation, punishment or deterrence and, as such, contravenes this Court's decision in *BMW*.[7] *See BMW*, 517 U.S. at 572-73.

Moreover, much of the evidence of purported "mad dog defense tactics" consisted of commentary by one of plaintiffs' experts about presentations on insurance litigation given at a conference for State Farm attorneys and claims managers by Hastings Law School Professor and Associate Dean Guy Kornblum. No showing was made that Professor Kornblum's presentation, which in fact was entirely proper, had any effect on the litigation of this case.

The Utah Supreme Court's punishment of extraterritorial conduct is made even clearer by its reliance upon State Farm's purported "nation-wide" practice of underpaying first-

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[7] The Utah Supreme Court also relied upon, as purported evidence of harassment, testimony cited in the trial court's order by DeLong and plaintiffs' expert witness Gary Fye that they found it objectionable to be deposed in every case in which they testified against State Farm. DeLong testified that she dislikes depositions conducted by a particular California lawyer and that she dislikes the bright lamps used for videotaping. Fye testified that he had been deposed three times for the present case and that he had not yet received all the payments due him from State Farm for those depositions. The deposing of Fye and DeLong in this case (even if they had been deposed by State Farm before in earlier – and factually different – cases) is not unlawful, does not constitute harassment or intimidation, and cannot justify punitive damages.

party claims. (6a, 18a, 20a, 37a, 43a) As evidence of that alleged "scheme," plaintiffs presented testimony regarding a variety of first-party claims practices that plaintiffs did not show to be unlawful in the state or states where they occurred. Much of the conduct was in fact clearly lawful. For example, plaintiffs presented testimony as to State Farm's specification in Colorado and California of non-OEM parts for the repair of its insureds' automobiles. Specification of non-OEM parts is expressly allowed by regulations in Colorado and California, as well as in Utah and most other states. *See* Cal. Bus. & Prof. Code § 9875.1; Colo. Rev. Stat. § 10-3-1305; Mass. Regs. Code tit. 211, § 133.04; Utah Code Ann. § 31A-22-319; *see also Exeter v. Geico Gen. Ins. Co.*, No. 47677-7-1, 2001 WL 1530948, at *4 (Wash. Ct. App. Dec. 3, 2001) (dismissing Consumer Protection Act claims based on specification of non-OEM parts; stating "the State Insurance Commissioner tacitly approved GEICO's use of non-OEM parts"). No state expressly prohibits insurers from specifying non-OEM parts.

Similarly, other first-party claims practices denounced by plaintiffs' experts as part of a nationwide "scheme" – such as the use of appearance allowances to settle claims for cosmetic damage to cars or trailers, the deduction of amounts for depreciation and/or betterment in settling property damage claims, the use of market surveys to settle claims for total loss vehicles, and the use of high-low settlement agreements in arbitrations – are permissible practices in Utah and other states. As this Court's decision in *BMW*, 517 U.S. at 573-74, makes clear, due process prohibits a court from awarding punitive damages to deter and punish lawful conduct.

Moreover, to the extent any of the extraterritorial conduct punished by the Utah Supreme Court is unlawful in the state where it occurred, the Court's punishment of that conduct is inconsistent with opinions by the United States Courts of Appeals for the Tenth and Eleventh Circuits. Those courts have stated that *BMW*'s prohibition on the punishment of extraterritorial conduct extends to all extraterritorial conduct, both lawful and unlawful. *See Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996) (*BMW* "prohibit[s] reliance upon inhibiting unlawful conduct in other states"); *Johansen v. Combustion Eng'g., Inc*, 170 F.3d

1320, 1333 (11th Cir. 1999) ("punitive damages must be based upon conduct in a single state – the state where the tortious conduct occurred – and reflect a legitimate state interest in punishing and deterring that conduct"). *Accord Ace v. Aetna Life Ins. Co.*, 40 F. Supp. 2d 1125, 1133 (D. Alaska 1999) (remitting punitive damages from $16.5 million to $950,000; stating that "the court reads the *BMW* case broadly enough to suggest that Alaska must leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct"); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 (Ind. Ct. App. 1999) (extraterritorial punishment is impermissible even when conduct "is unlawful in every state of the union"). Accordingly, certiorari is warranted to resolve the issue that this Court expressly left unanswered in *BMW*: namely, whether a state may properly attempt to change unlawful conduct in other states. *See BMW*, 517 U.S. at 574 n.20.[8]

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[8] Any contention by plaintiffs that State Farm waived its constitutional extraterritoriality argument for purposes of review by this Court would be manifestly incorrect. State Farm presented its extraterritoriality/due process argument to the trial court *in limine* (168a-172a, 185a-188a) and in its post-trial briefs in support of remittitur and renewed that argument in its briefs before the Utah Supreme Court. A post-trial motion for remittitur is the proper time and manner to raise an argument that a punitive award is constitutionally excessive including on grounds of extraterritoriality. *See Pulla v. Amoco Oil Co.*, 882 F. Supp. 836, 848-50 (S.D. Iowa 1994) (remitting punitive award as excessive; constitutional excessiveness challenge based on extraterritoriality was properly raised in post-trial remittitur motion), *aff'd in part, rev'd in part*, 72 F.3d 648 (8th Cir. 1995) (reversing punitive award entirely). The trial court held post-trial that State Farm had waived its constitutional extraterritoriality argument only with respect to its JNOV/new trial motion. State Farm believes that the trial court's ruling was incorrect under Utah procedure, because State Farm had properly made objections to extraterritorial evidence in its *in limine* arguments before the trial court. *See City of Hildale v. Cooke*, 28 P.3d 697, 702 (Utah 2001) (where trial judge denies pretrial motion to exclude evidence, a party need not object during trial to preserve issue for appeal). In any case, the trial court did not find that State Farm had waived the *BMW* extraterritoriality argument with respect to remittitur. Indeed, at the *in limine* hearing, the trial court specifically assured State Farm that it would consider that argument on a later motion for remittitur. (189a-190a)

II. The Utah Supreme Court's Reliance upon a Purported Nationwide "Pattern" of Conduct Contravenes Fundamental Due Process Principles

The Utah Supreme Court attempted to justify its punishment of out-of-state and dissimilar conduct by characterizing each instance of alleged corporate wrongdoing as part and parcel of an over-arching "pattern" or "scheme" of nationwide misconduct. (6a, 18a, 20a) This approach could be construed to permit a plaintiff to recover massive punitive damages based upon every alleged wrongful act committed nationwide by a corporate defendant over decades, so long as the specific wrongdoing of which the plaintiff complains can be rhetorically linked to the generalized "pattern" or "scheme" of corporate malfeasance defined by the plaintiff. It would be as if the plaintiff in *BMW* had resorted to the rhetorical fiction that the defendant's failure to disclose the pre-sale repair of his car was part of a generalized "pattern" or "scheme" of deceptive sales practices. Had the plaintiff in *BMW* defined the alleged wrongdoing in this catch-all manner, evidence of a broad panoply of corporate acts could have been introduced into evidence and punished by the jury, notwithstanding the fact that much or all of such conduct would have had nothing to do with the specific wrongdoing in the case – at least when considered at any rational level of specificity and concreteness. That is precisely what happened in the present case. Such an open-ended expansion of the punitive damages inquiry eviscerates the constitutional constraints on punitive damages set forth by this Court in *BMW*.

Moreover, as a factual matter, the Utah Supreme Court's characterization of the conduct in this case as part of a "pattern" is incorrect. If State Farm's conduct toward the Campbells had been part of an alleged twenty-year "pattern" of repeated practices, that conduct itself would have been repeated. It was not. The excess verdict against Mr. Campbell following State Farm's refusal to settle within policy limits was the only such excess verdict case in Utah in which a State Farm insured was exposed to the possibility of execution on such a judgment even for a short time. Not only was there no pattern of improper failure to settle by State Farm, but this single, isolated failure to settle within policy limits cannot rationally be considered to form part of any nation-

wide "pattern" of alleged wrongful business practices.[9]

The Utah Supreme Court's imposition of huge punitive damages on State Farm as an institution for a twenty-year "pattern" of conduct dissimilar and unrelated to the conduct underlying the plaintiffs' claims contravenes a fundamental principle of this Court's due process jurisprudence: that the punishment must be proportional to the conduct that is the basis of plaintiffs' claims. *See BMW*, 517 U.S. at 575 & n.24 ("exemplary damages imposed on a defendant should reflect 'the enormity of his offense'"; "[t]he principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence'") (citations omitted); *Solem v. Helm*, 463 U.S. 277, 284, 290 (1983) ("a criminal sentence must be proportionate to the crime for which the defendant has been convicted"); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."). *See also Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979) (finding punitive award excessive where it apparently punished defendant "for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff"), *modified on reh'g*, 615 P.2d 621 (Alaska 1980) (reducing original punitive damages award of $2,895,000 to

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[9] In relying upon the purported "pattern," the Utah Supreme Court also disregarded the significant differences in the legal standards governing State Farm's conduct with regard to first-party and third-party claims. Insurance companies owe contractual and other duties to first-party claimants, who are their insureds. However, under the laws of nearly every state, including Utah, an insurance company owes no comparable duties to third-party claimants. *See, e.g., Kleckley v. Northwestern Nat'l Cas. Co.*, 526 S.E.2d 218, 219-20 (S.C. 2000) (South Carolina does not recognize a third-party action for the bad-faith refusal to pay insurance benefits). Even assuming *arguendo* that an insurance company's claims practices were in some cases improper with regard to its insureds, such same conduct would not give rise to a cause of action by a third-party claimant. *See Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 748 (Utah Ct. App. 1991); *Ammerman v. Farmers Ins. Exch.*, 430 P.2d 576, 577-78 (Utah 1967). Indeed, with respect to third-party claims, it is an insurance company's duty to seek or accept a settlement on terms favorable to its insured, not to the third party. Thus, legally as well as factually, an insurer's handling of third-party claims is significantly different from the handling of policyholders' claims under their policies.

$500,000 instead of $250,000). In cases such as the instant one where the defendant is a national corporation, providing mass marketed products or services, this requirement of proportionality of punitive damages to the specific conduct at issue serves the additional "important purpose . . . [of] prevent[ing] multiple recovery at the defendant-seller's expense by insuring that the plaintiff collects only his proportion of the punitive damages." *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1099 (Pa. 1985).

The trial of claims against a corporate defendant for punitive damages on a nationwide "institutional" level, as was done in this case, represents a radical departure from the protections inherent in the traditional litigation model and creates an unreasonable risk of arbitrary punitive awards. In traditional litigation, the "jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 141 (1986). Thus, "[a]lthough not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry" that served to anchor punitive damages to the underlying claims and injuries of the plaintiffs. *Id.*

In this case, the Utah Supreme Court improperly approved a procedure that permitted the Campbells, through their claim for punitive damages, to put State Farm on trial as an institution for its conduct nationwide, whether lawful or unlawful, for over twenty years. The precedent set by the Utah Supreme Court, if allowed to stand, would subvert the central due process requirements of fairness, proportionality and reasonableness and expose corporations and businesses to vast and repetitive punitive awards. This result contravenes the principles set forth by this Court in *BMW* and warrants a grant of certiorari.

III. The Utah Supreme Court's Application of the *BMW* Guideposts Conflicts with *BMW* and Federal and State Appellate Decisions Following *BMW*

The Utah Supreme Court's decision fundamentally misapplies the three guideposts identified by this Court in *BMW* for determining whether a punitive damage award is unconstitutionally excessive. The Utah Supreme Court's interpretation of the three guideposts removes all meaningful constraints on the size of punitive awards and conflicts not only with *BMW*, but also with decisions by federal and state appellate courts.

A. The Extreme 145 to 1 Ratio Approved by the Utah Supreme Court Contravenes Due Process and Is Contrary to *BMW*

In *BMW*, this Court held that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." *BMW*, 517 U.S. at 580. Indeed, "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* Application of this guidepost should serve to focus a court's attention on the "relationship between the penalty and the harm to the victim caused by the defendant's actions," *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001), thus tying the punitive award to the facts underlying the plaintiffs' claims. Although this Court in *TXO* upheld a punitive award where "the relevant ratio was not more than 10 to 1,"[10] *BMW*, 517 U.S. at 581, the Court has stated that a punitive damage award of four times the amount of compensatory damages is "'close to the line'" in terms of constitutional propriety. *BMW*, 517 U.S. at 581 (quoting *Haslip*, 499 U.S. at 23-24).

In this case, the $145 million punitive damages award reinstated by the Utah Supreme Court stands in a 145 to 1 ratio to the remitted compensatory damages award of $1 million. This 145 to 1 ratio is far in excess of ratios that have been overturned as unconstitutional by United States Courts of Appeals, as well as by state courts of last resort, in cases such

[10] The Utah Supreme Court incorrectly identified the relevant ratio in *TXO* as being 526 to 1 ratio. (30a).

as this one where substantial, not nominal, compensatory damages have been awarded. For example, the Tenth Circuit held that, consistent with this Court's decisions in *BMW* and *Haslip,* punitive awards generally cannot exceed a 10 to 1 ratio and that a ratio higher than 4 to 1 will rarely be upheld. *See FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997). Similarly, the Eighth Circuit characterized a ratio of 14.89 to 1 as very high and found that a 4 to 1 ratio was constitutionally appropriate. *See Watkins v. Lundell*, 169 F.3d 540, 546 (8th Cir. 1999); *see also Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 639 (10th Cir. 1996) (under *BMW*, ratios in a range between 4 to 1 and 10 to 1 are constitutional; ratio generally cannot constitutionally exceed 10 to 1); *Ace*, 40 F. Supp. 2d at 1135 (ratio of 71 to 1 was clearly excessive to punish the insurer's bad-faith denial of a claim for disability benefits); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) (punitive award more than 13 times actual or potential compensatory damages was "clearly 'beyond the line'"); *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 504-05 (S.D. 1997) (rejecting 13.5 to 1 ratio; remitting $4.8 million punitive award to $1 million). Indeed, even in cases where courts have found that the defendant's conduct toward the plaintiffs was highly reprehensible, ratios much lower than the 145 to 1 ratio in this case have been rejected as too high. *See, e.g., Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 179-80 (Mo. Ct. App. 1998) (where compensatory damages were large, ratio of 27 to 1 was excessive under *BMW* despite reprehensibility of conduct, which caused a death); *Orkin Exterminating Co. v. Jeter*, No. 1000710, 2001 WL 1391443, at *12-15 (Ala. Nov. 9, 2001) (10 to 1 ratio was excessive despite "highly reprehensible" conduct).

The Utah Supreme Court's ratio analysis was skewed by its focus not on the facts relevant to the Campbells, but on purported facts relevant only to plaintiffs' "institutional case" against State Farm. For example, the Court emphasized what it stated was a "fact" found by the trial court -- that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability." (30a, 34a) The trial court never

made such a finding.[11] Plaintiffs' 1 in 50,000 figure was apparently based upon testimony regarding purported underpayments of first-party claims and had no relevance to third-party excess verdict cases, like the Campbell case. An insurance company's refusal to settle third-party claims within policy limits is far from "clandestine." Moreover, such a refusal to settle can be wrongful *only* if it leads to an excess verdict, and it will hardly escape a policyholder's notice that an excess verdict has been rendered against him or her at trial. Indeed, according to the testimony of plaintiffs' expert Gary Fye, whenever a third-party claim results in an excess verdict against an insured, it is "typical" for the plaintiff's lawyer to approach the insured and arrange to pursue the insured's potential bad faith claim against his or her insurer – exactly as happened in the Campbell case. Thus, the 1 in 50,000 figure is completely inapplicable to third-party excess verdict cases.

Similarly, the Utah Supreme Court incorrectly characterized the injury here as one in which, under *BMW*, a higher ratio might be justified because "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" (29a-30a (quoting *BMW*, 517 U.S. at 582)) The Utah Supreme Court is clearly incorrect: far from being difficult to detect, the injury to the Campbells – namely their potential personal liability for a verdict in excess of their insurance coverage with their attendant emotional distress – was immediately apparent when the excess verdict against them was rendered. Indeed, the plaintiffs' attorneys in the underlying case against Mr. Campbell, who later became the Campbells' attorneys, were already laying the groundwork for the Campbells' lawsuit against State Farm even before the excess verdict against Mr. Campbell was rendered. *See supra* at 1-2. Furthermore, the jury had no trouble assessing the Campbells' noneconomic harm, awarding the Campbells $2.6 million in emotional distress damages, which the trial court remitted to $1 million. Thus, contrary to the Utah Supreme Court's assertion, this case did not present the factors noted by this Court in *BMW* as supporting a higher ratio: plaintiffs' injury was not concealed and the

[11] Indeed, in preparing its order, the trial court deleted a proposed finding by the plaintiffs that contained this supposed "fact."

compensatory damages were not small or hard to determine. *See BMW*, 517 U.S. at 582; *see also Letz*, 975 S.W.2d at 179 (27 to 1 ratio was excessive where actual damages were large and actual harm to plaintiffs "was relatively proportionate to the harm likely to result from the conduct").

In defending the 145 to 1 ratio, the Utah Supreme Court also erroneously relied upon the purported fact that State Farm "ha[d] not changed its conduct despite a previous $100 million punitive damage award" in Texas. (34a; *see also* 17a, 30a) That $100 million award was never entered by the Texas trial court and never binding on State Farm because State Farm entered into a settlement agreement with the Texas plaintiff. Moreover, the $100 million award was made by a Texas jury in a case involving first-party claims by a State Farm insured for underinsured motorist coverage. The Texas case had no similarity whatsoever to the present case and therefore lends no rational support to the notion that a large award was needed to deter the conduct at issue in the present case. *See Leab v. Cincinnati Ins. Co.*, No. 95-5690, 1997 WL 360903, at *13 (E.D. Pa. June 26, 1997) (earlier punitive award did not support higher ratio where there were "significant differences" in facts of earlier case).

Moreover, the Utah Supreme Court's reliance on the Texas punitive award is untenable in light of the indisputable fact that, after the excess verdict against Mr. Campbell, State Farm never again let a Utah policyholder be exposed to personal liability on an excess verdict through State Farm's decision to proceed to trial rather than accept an offer to settle within policy limits. State Farm's regional vice-president, Buck Moskalski, testified that in the five excess verdict cases in Utah since 1989, State Farm had recognized that it should bear the responsibility for its decision to proceed to trial and had either paid the excess verdicts in full or settled with the third-party claimants so that the insureds paid nothing. In addition, Mr. Moskalski testified as to his decision made during the trial to formalize State Farm's policy of paying excess verdicts by sending excess assurance letters to insureds prior to trial, promising to pay any compensatory damages that a jury might award in excess of policy limits. State Farm has adopted the policy of sending such letters not only in Utah, but nationwide. The Utah Supreme Court's refusal to give

weight to Mr. Moskalski's uncontradicted testimony (24a) was inconsistent with the Court's obligation under *BMW* to consider whether "less drastic remedies" than the $145 million punitive award could have been expected to deter future conduct of the kind directed toward the Campbells, or, indeed, whether any deterrence at all was needed. *See BMW*, 517 U.S. at 584; *see also id.* at 565-66 (noting that "[b]efore the judgment in this case, BMW changed its policy by taking steps to avoid the sale of refinished vehicles in Alabama and two other States").

In sum, the Utah Supreme Court's disregard of the 145 to 1 ratio in this case is inconsistent with this Court's decision in *BMW* and federal and state decisions following *BMW*. The Utah Supreme Court's ratio analysis is symptomatic of the larger error in its decision, namely, its punishment and deterrence of a whole range of extraterritorial and dissimilar conduct not at issue in plaintiffs' claims against State Farm. This Court should grant certiorari to clarify the constitutional constraints embedded in the ratio guidepost.

B. The Utah Supreme Court's Analysis of the Reprehensibility Guidepost Impermissibly Relies Upon the Alleged Reprehensibility of Dissimilar Conduct, in Contravention of *BMW*

The Utah Supreme Court's extensive reliance upon dissimilar conduct, described above, resulted in a fundamental misapplication of the reprehensibility guidepost. The Utah Supreme Court's reliance on such conduct went far beyond the constitutionally permissible use of repeated, similar conduct as described in this Court's decisions on punitive damages. This Court has indicated that "repeated misconduct" may be "more reprehensible than an individual instance of malfeasance," *BMW*, 517 U.S. at 577, and that "'the existence and frequency of *similar* past conduct'" may be considered in determining the maximum amount of punitive damages that is constitutionally permissible for conduct in a given case. *See TXO*, 509 U.S. at 462 n.28 (emphasis added) (quoting *Haslip*, 499 U.S. at 21-22). The principle recognized by this Court is that consideration of similar conduct by a defendant may assist the court or the jury in evaluating the nature of the conduct at issue. Accordingly, in *BMW*, 517 U.S. at 563-64, in evaluating the reprehensibility of BMW's failure to disclose pre-sale repairs to Dr. Gore's car, this Court considered documented instances of substantially identical failures by BMW to disclose pre-sale repairs.

In the present case, it is indisputable that excess verdicts against State Farm insureds following refusals by State Farm to settle within policy limits have been extremely rare, and that the Campbell case was the only one in Utah in which the insured faced the possibility of personal liability for the excess verdict even for a short time. Indeed, the judgments against Mr. Campbell were never executed upon and were ultimately paid in full by State Farm. In analyzing reprehensibility, however, the Utah Supreme Court did not make the constitutionally permissible inquiry as to whether State Farm had shown a pattern of acting in bad faith in exposing insureds to excess verdicts -- which it had not. Rather, the Court looked to twenty years of dissimilar conduct purportedly carried out by State Farm as part of a nationwide scheme. Moreover, the Court did not use that dissimilar conduct to aid its assessment of the reprehensibility of State Farm's conduct toward the Campbells. Rather, the Court clearly assessed the reprehensibility of State Farm's unrelated and dissimilar conduct over two decades and relied upon the reprehensibility of that unrelated and dissimilar conduct to justify the huge punitive award against State Farm.

In analyzing reprehensibility, the Utah Supreme Court cited, *inter alia*, State Farm's two-decades long "PP&R scheme," State Farm's purported concealment or destruction of documents,[12] purported discrimination, and purported ha-

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[12] Notably, after the close of evidence, the trial court gave little credence to the plaintiffs' allegations that State Farm regional vice president Buck Moskalski had deliberately ordered documents destroyed to avoid their discovery in this case. The trial court refused to give a spoliation instruction, stating:

> The documents that have been produced that were thought to have been destroyed do not give rise to the worst inferences that the plaintiffs would have us draw that they are harmful and that State Farm purposely destroyed them in the face of an existing discovery order to avoid their being seized in discovery and presented to the jury. I just don't think there has been a showing that that has happened . . . . And I frankly am of the view, whether it's relevant or

(continued...)

rassment and intimidation of opposing claimants, witnesses, and attorneys. (18a-19a, 29a) As discussed above, much of the conduct cited by the Court was completely irrelevant to State Farm's treatment of the Campbells, who made no allegation and presented no evidence that they were discriminated against because of age, race or poverty and who presented no evidence that State Farm harassed or intimidated them or their witnesses and attorneys in connection with this case.

Furthermore, even assuming that this and all the other conduct cited by the Utah Supreme Court could be said to form a "pattern," the dissimilar acts supposedly making up that "pattern" could not shed light on the conduct at issue here. Evidence of cancellation of hurricane coverage in Florida does not shed light on State Farm's handling of the third-party claims in this case. Nor is the evidence of the specification of non-OEM parts, and the host of other conduct that supposedly made up State Farm's "pattern" of conduct nationwide, in any way relevant to the specific conduct in this case. The Utah Supreme Court's erroneous "institutional" approach to weighing reprehensibility could be construed to allow every plaintiff suing a business or corporation to attempt to show reprehensibility by putting on the same kind of "institutional case," based on the corporation's conduct nationwide over decades. Such a procedure would improperly multiply the opportunities for enormous repetitive punitive awards with little or no relation to the facts of the particular case.

Clearly, due process mandates that the reprehensibility analysis focus on the defendant's specific conduct toward the plaintiffs and does not permit a roving inquiry into the defendant's general reprehensibility as an "institution" over twenty years. The Utah Supreme Court's misapplication of the *BMW* reprehensibility guidepost resulted in an award of punitive damages "run wild," warranting a grant of certiorari. *See*

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[12](...continued)
not on this issue, that Moskalski didn't do it fully recognizing that there was a bad-faith case in which there was a discovery order and that was a way to get rid of documents that should properly be produced. I don't think that's what was going on in his head . . . .

TXO, 509 U.S. at 475 (O'Connor, J. dissenting) ("time and again, this Court and its Members have expressed concern about punitive damages awards "'run wild'"); *Haslip*, 499 U.S. at 18 (same).

C. The Utah Supreme Court Erroneously Justified the Punitive Award in this Case through a Comparison to Penalties Available for Multiple Instances of Other Conduct Unrelated to the Campbells' Claims

The Utah Supreme Court also failed to adhere to *BMW*'s third constitutional guidepost – i.e., an analysis of civil and criminal penalties for comparable conduct. *See BMW*, 517 U.S. at 583-84. It is clear from *BMW* that "comparable conduct" means conduct comparable to the conduct underlying the plaintiffs' claims. Thus, in *BMW*, this Court looked to the possible sanction of $2,000 for a violation of the Alabama Deceptive Trade Practices Act comparable to the defendant's failure to disclose to the plaintiff the pre-sale repair of his automobile. This Court noted that the Alabama statute did not provide fair notice that a single violation, or even fourteen violations, could subject an offender to a multimillion dollar penalty. *Id.* at 584.

The Utah Supreme Court misapplied the *BMW* analysis by including in its consideration of this guidepost penalties for a host of conduct other than the underlying conduct toward the plaintiffs. The Court did not look to possible penalties for State Farm's failure to settle within policy limits the third-party claims against its insured, Mr. Campbell. Rather, the Court looked to possible civil or criminal penalties for multiple instances of various allegedly fraudulent types of conduct by State Farm over two decades. The Court adopted the trial court's finding that the "'penalties that could be imposed under Utah law for the fraudulent scheme that has been pursued by State Farm are enormous" and included "a $10,000 fine for each act of fraud . . . ." (35a (citing Utah Code Ann. §§ 31A-26-301 *et seq.* (the Utah Unfair Claims Practices Act)))

In fact, the proper constitutional guidepost under *BMW* would be a single $10,000 fine under the Utah Unfair Claims Practices Act for a single instance of conduct comparable to State Farm's conduct toward the Campbells. Like the limited

fines under the Alabama Deceptive Trade Practices Act that served as a guidepost in *BMW*, the $10,000 fine for comparable conduct under the Utah Act did not provide "fair notice" that a single violation "might subject an offender to a multi-million dollar penalty." *See BMW*, 517 U.S. at 584. Indeed, the relevant $10,000 fine for comparable conduct is 14,500 times less than the $145 million punitive award reinstated by the Utah Supreme Court and unmistakably signals the gross excessiveness of that award.

The Utah Supreme Court also cited the penalties available under the Utah Pattern of Unlawful Activities Act (the Utah state RICO statute), Utah Code Ann. §§ 76-10-1602 (ppp); 76-10-1603.5(5). (35a) This statute does not penalize a single instance of conduct, but only a pattern of multiple acts. Thus, the penalties for violation of this statute are not the appropriate guidepost under *BMW*, because the claims in this case are based upon a single alleged bad-faith failure to settle within policy limits. Moreover, this statute is clearly inapplicable to the conduct at issue in this case. The list of criminal offenses to which the Utah Pattern of Unlawful Activities Act applies contains no offense that could conceivably constitute comparable conduct, including the subsection specified by the Utah Supreme Court, § 76-10-1602 (ppp), which lists "a confidence game" as an unlawful activity for purposes of the Act.

The remaining sections of the Utah Criminal Code cited by the Utah Supreme Court in its analysis of sanctions for comparable conduct are merely sentencing provisions, not substantive provisions defining criminal offenses. For example, the Utah Supreme Court states that "under Utah Code Ann. §76-3-303, State Farm's officers could be imprisoned or removed for up to five years." (35a) Section 76-3-303 is a sentencing provision, not a substantive provision, and would only be applicable if State Farm's conduct toward the Campbells constituted an offense as defined by Utah's Criminal Code -- which it does not. Moreover, contrary to the Utah Supreme Court's opinion, section 76-3-303 does not authorize imprisonment at all; it authorizes a court to disqualify an executive who has been convicted of an offense from exercising managerial functions for a period of up to five years. *See* Utah Code Ann. § 76-3-303(2). Accordingly, the Court is

plainly incorrect in stating that there is a possibility of imprisonment under section 76-3-303 and in concluding that this non-existent possibility of imprisonment is "an extremely important consideration" justifying the $145 million punitive award. (35a)

In short, the Utah Supreme Court's analysis of sanctions for comparable misconduct fails to follow the required constitutional analysis under *BMW* -- first, by looking to sanctions for a purported twenty years of various acts of misconduct, rather than the $10,000 fine provided by Utah law for a single instance of comparable misconduct, and, second, by looking to penalties and statutes that are clearly inapplicable and irrelevant. State Farm submits that this analysis by the Utah Supreme Court improperly transforms the third constitutional guidepost under *BMW* from a meaningful constraint on the amount of a punitive damages award, to a means of permitting civil litigants in a single case to seek to punish a corporation as an institution for a host of conduct unrelated to their claim and which had no effect upon them.

The Utah Supreme Court's decision also conflicts with the Eleventh Circuit's decision in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999). In *Johansen*, the Eleventh Circuit determined that, as a matter of due process, "it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute." *Johansen*, 170 F.3d at 1337 (emphasis added). Rather, according to the Eleventh Circuit, "constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether th[e] defendant had reason to believe that his specific conduct could result in a particular damage award." *Id.; see also In re Exxon Valdez*, 270 F.3d 1215, 1245-46 (9th Cir. 2001) (vacating punitive award in light of *BMW* and *Cooper Industries*; in evaluating penalties for comparable conduct, looking not only to maximum statutory penalties, but to the fine actually imposed).

Here, not only did the Utah Supreme Court ignore the specific conduct at issue in the case, but it also presumed that the maximum penalties were the sole relevant standard of comparison. The Court rejected State Farm's argument that the practice of the Utah insurance commission and the level of

penalties actually imposed in comparable cases were relevant to the issue of whether State Farm had adequate notice of the $145 million punitive award in this case. Moreover, in asserting that under *BMW* the proper standard is the maximum penalty allowed by the Utah legislature (36a), the Court ignored contrary language in *BMW* defining the standard as "civil penalties authorized or imposed in comparable cases." 517 U.S. at 575. Clearly, as the Eleventh Circuit held, the penalties actually imposed in other cases are relevant to the issue of whether a defendant had adequate notice of the magnitude of the penalty that might be imposed.[13] The Utah Supreme Court's fundamental distortion of the third *BMW* guidepost and the conflict between the decisions of the Utah Supreme Court and Eleventh Circuit warrant a grant of certiorari.

IV. The Utah Supreme Court's Overreliance on State Farm's Wealth Nationwide Is in Conflict with *BMW* and Decisions by Other Courts

Certiorari should also be granted to clarify to what extent, if any, a national corporation's wealth should be a factor in the constitutional inquiry into the excessiveness of a punitive damage award. The Utah Supreme Court repeatedly cited State Farm's "enormous" wealth nationwide as a justification for the $145 million punitive award. (17a, 30a) Since *BMW*, numerous courts have recognized that a defendant's wealth cannot justify an award that is excessive under the *BMW* guideposts. *See, e.g., BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997) (on remand; a large punitive award "should not be upheld upon judicial review merely because the defendant has the ability to pay it"). Moreover, the Utah Supreme Court failed to recognize that reliance on the wealth of a national corporation (like State Farm) as a factor in punitive awards must be balanced by concerns for the federal system and the need to avoid imposing undue burdens on interstate commerce. The court in *Ace v. Aetna Life Insurance Co.*, 40 F. Supp. 2d 1125 (D. Alaska 1999), addressed this issue, stating that, under this Court's decision in *BMW*, "due process and comity concerns counsel restraint where a proposed award of punitive damages is based to a significant degree on an accumulation of wealth generated outside the jurisdiction where the wrong was suffered." 40 F. Supp. 2d at 1135. Accordingly, in the case of a national company, "[h]eavy reliance on a defendant's aggregate wealth would be inappropriate" and "[s]ome tempering of the weight given that criterion [wealth] is necessary where it cannot be adjusted to reflect that which is necessary to protect the interests of each individual state's consumers" so as to "leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct." *Id.* at 1132-33; *see also Johansen*, 170 F.3d at 1338 (defendant's wealth cannot justify an award "so large as to 'implicate[ ] the federal interest in preventing . . . undue burdens on interstate commerce'") (quoting *BMW*, 517 U.S. at 585).

The Utah Supreme Court justified the $145 million punitive award by reference to State Farm's entire surplus (17a), most of which was earned by business activities outside of Utah. Thus, the award impermissibly infringes upon the interests of other states to regulate the business of insurance within their own borders by defining for themselves wrongful conduct and the appropriate means and levels of deterrence. As this Court stated in *BMW*, the fact that a defendant

> is a large corporation . . . does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, [a defendant's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.

BMW, 517 U.S. at 585.

The Utah Supreme Court's improper emphasis on State Farm's nationwide wealth compounds the constitutional errors that pervaded its decision to reinstate the $145 million

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[13] Moreover, under *Johansen*, 170 F.3d at 1337, any theoretical possibility of imprisonment under Utah law would not be relevant to the constitutional adequacy of the notice afforded to insurance companies such as State Farm of such a possible penalty in an excess verdict case. Plaintiffs made no showing whatever that any employee or agent of any insurer has ever been imprisoned in Utah or elsewhere in connection with an excess verdict resulting from an alleged failure to settle within policy limits.

award in this case and provides an additional reason for this Court to grant certiorari. The Utah Supreme Court's reinstatement of the huge punitive award against State Farm, a mutual insurance company, is particularly egregious because the punitive award will benefit Utah plaintiffs and possibly the State of Utah[14] at the expense of State Farm policyholders nationwide.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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[14] The State of Utah has asserted that it is entitled to approximately 50% of the $145 million punitive award under Utah Code Ann. § 78-18-1(3).

[15] *See Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950) (a mutual insurance company "is a co-operative enterprise wherein the policyholders, as members, are both insurer and insured"); *Rowen v. Le Mars Mutual Ins. Co.*, 282 N.W.2d 639 (Iowa 1979) (vacating award of punitive damages against mutual insurance company, where punitive damages would fall on innocent policyholders).

APPENDIX

DECISION OF THE UTAH SUPREME COURT
DATED OCTOBER 19, 2001

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Utah.

Curtis B. CAMPBELL and Inez Preece Campbell, Plaintiffs, Appellees, and Cross-Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant, Appellant, and Cross-Appellee.

No. 981564.

Oct. 19, 2001.

INTRODUCTION

DURHAM, Justice:

¶ 1 On August 24, 1989, plaintiffs Curtis B. and Inez Preece Campbell, sued State Farm Mutual Automobile Insurance Company for damages arising from State Farm's decision to try a third-party automobile accident case in which Mr. Campbell was the defendant, rather than accepting offers to settle for the policy limits of Mr. Campbell's insurance policy. The jury found in plaintiffs' favor, awarding them $911.25 in out-of-pocket costs, $2.6 million in compensatory damages, and $145 million in punitive damages. State Farm filed several

post-verdict motions challenging the jury verdict, which the trial court rejected. As a condition of denying State Farm's motion for a new trial, however, the trial court remitted the compensatory damage award from $2.6 million to $1 million and the punitive damage award from $145 million to $25 million. The Campbells also received a judgment from the trial court for attorney fees and litigation expenses in the amount of $801,582.48. State Farm has appealed from the judgment and the Campbells have cross-appealed the trial court's remittitur ruling on punitive damages.

BACKGROUND

¶ 2 On May 22, 1981, while driving north on Highway 89-91 near Logan, Utah, Mr. Campbell unsafely passed a car driven by Robert Slusher (Slusher).[1] *Slusher*, 777 P.2d at 438-39. This unsafe maneuver forced a southbound car, driven by Todd Ospital, to veer onto the shoulder of the road and collide with Slusher's car a split second later. *Id.* at 439. The accident killed Todd Ospital at the scene and left Slusher disabled. *Id.* Although the initial investigation of the accident supported differing conclusions as to who caused the accident, a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash.

¶ 3 In September 1981, Slusher filed an action against Mr. Campbell, Ospital's estate (Ospital), and Kenneth Brooks (the

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1 The facts as stated herein are drawn from the record on appeal and from the cases of *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989), and *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130 (Ut.Ct. App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1992).

owner of the car driven by Todd Ospital) for damages resulting from the collision. *Slusher*, 777 P.2d at 439. Ospital filed a cross-claim against Mr. Campbell for wrongful death. *Id.* Mr. Campbell cross-claimed against Ospital for contribution. *Id.*

¶ 4 During discovery, State Farm collected evidence that blamed Mr. Campbell for the accident. At various stages throughout discovery, including as late as a month before trial, Slusher and Ospital invited State Farm to settle for the policy limits of the Campbell policy.[2] On April 23, 1983, Ospital's counsel even sent a letter to State Farm stating that State Farm "should tender its limits" because "[a] limit of $25,000 is too low to risk excess exposure by exposing its insured to personal liability." This letter also stated that if State Farm continued to oppose settlement, Ospital would seek a separate agreement with Slusher that "may not likely be favorable to [Mr.] Campbell's interests." However, State Farm never departed from its original "no settlement" stance, continuing to reject offers made following the commencement of the trial.

¶ 5 In choosing not to settle, State Farm superintendent Bob Noxon (Noxon) and divisional superintendent Bill Brown (Brown) rejected a report of State Farm investigator Ray Summers (Summers) that stated there was evidence of fault on Mr. Campbell's part. In particular, Brown ordered Summers to change the portion of his report describing the facts of the accident and his analysis of liability "wherein [he] had indicated an exposure [for Mr. Campbell], and that there could be a high settlement value on it." Additionally, after hearing from

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2 Mr. Campbell's policy provided $25,000 of coverage for each person injured in an accident up to a maximum of $50,000 of coverage per accident. *Campbell*, 840 P.2d at 133.

Bill Brown, Noxon told Summers that Noxon had "screwed up" by agreeing with Summers' initial analysis regarding Mr. Campbell's fault and demanded that Summers return to Noxon the letter Noxon had written indicating his approval. Subsequently, State Farm discontinued Summers' involvement in the case. State Farm hired Wendell Bennett (Bennett), an attorney who had done a considerable amount of work for State Farm, to represent the Campbells.

¶ 6 In June 1983, Ospital's estate did in fact enter into a separate settlement agreement with Slusher. Ospital had $130,000 of combined liability insurance.[3] Under the settlement agreement, Ospital's estate paid Slusher $65,000 dollars and the Ospitals promised to assist Slusher in prosecuting claims against Mr. Campbell and his insurer, State Farm. In exchange, Slusher released all claims he had against Ospital's estate. *Id.*

¶ 7 Shortly thereafter, the case against Mr. Campbell went to trial. The jury found Mr. Campbell 100% at fault for the accident and a judgment for $135,000 was entered. *Slusher*, 777 P.2d at 439. The jury also awarded Ospital damages in the amount of $50,849. In light of Bennett's numerous reassurances to both Mr. and Mrs. Campbell that their assets were safe, that they had no liability for the accident, that he would represent their interests, and that they did not need to procure separate counsel, the Campbells were utterly dismayed. To their expressions of dismay, Bennett responded by telling the Campbells that "[y]ou may want to put for sale signs on your

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[3] Todd Ospital's policy provided $100,000 of coverage for each person injured in an accident up to a maximum of $300,000. Additionally, Brooks maintained $30,000 of liability coverage on the car Ospital was driving.

property to get things moving," making it clear that State Farm did not intend to pay the excess judgment against the Campbells. Furthermore, State Farm declined to post a supersedeas bond on appeal in excess of their $25,000 policy limit. The Campbells immediately acquired other counsel and learned that their situation was indeed grave.

¶ 8 In late 1984, Slusher, Ospital, and Mr. Campbell entered into an agreement in which Mr. Campbell agreed that: (1) he would pursue a bad faith action against State Farm; (2) Ospital's and Slusher's attorneys would represent him in that action; (3) Slusher and Ospital would have the right to be part of all major decisions relating to that action; (4) no settlement of any claim against State Farm could be made without Slusher's and Ospital's approval; and (5) in the event Mr. Campbell recovered any monies, Ospital and Slusher would receive 90% of the sum remaining after certain agreed-upon obligations were paid. In exchange, Slusher and Ospital agreed to not seek satisfaction of their judgment from Mr. Campbell and to inform anyone checking on Mr. Campbell's credit that their judgments were not personal obligations. *Id.*

¶ 9 In 1989, this court affirmed the 1983 verdict against Mr. Campbell. *Slusher v. Ospital*, 777 P.2d 437, 438-39 (Utah 1989). State Farm then paid all of the damages awarded in the 1983 action, both its policy limits and Mr. Campbell's personal liability. Shortly thereafter, the Campbells filed this action against State Farm alleging, among other things, bad faith, fraud, and intentional infliction of emotional distress. The trial court granted summary judgment to State Farm on the ground that because it had ultimately paid all of the damages awarded, there had been no bad faith as a matter of law. Plaintiffs appealed to this court, which transferred the case to the Utah Court of Appeals, which reversed and remanded, stating that although State Farm had paid the debt, the Campbells had the

right to pursue their claim that there had been bad faith in the previous dealings. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130, 143 (Utah Ct. App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1992).

¶ 10 On remand, the trial court denied State Farm's motion to introduce the settlement agreement entered into by Slusher and Ospital before the original trial in Logan, Utah. However, over the Campbells' resistance, the trial court did grant State Farm's motion to bifurcate the trial. In phase I of the trial, the jury was to determine whether State Farm acted in bad faith. *Id.* Only if the jury found such bad faith would phase II, setting the compensatory damages award for State Farm's bad faith and addressing the Campbells' claims for fraud, intentional infliction of emotional distress, and punitive damages, occur.

¶ 11 In phase I, the jury found that State Farm had acted unreasonably and in bad faith in its decision to take the case to trial because there was a substantial likelihood of an excess judgment against Mr. Campbell. Notwithstanding this finding of bad faith, State Farm argued during phase II that its decision to take the case to trial was an "honest mistake" that did not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This scheme was referred to as State Farm's "Performance, Planning and Review," or PP & R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether

State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages.

¶ 12 At the close of the evidence, the jury awarded the Campbells $2.6 million[4] in compensatory damages and $145 million in punitive damages. State Farm made several post-verdict motions, including motions for a judgment notwithstanding the verdict, for a new trial, and for remittitur of the damage awards. Ultimately, the trial court denied all of State Farm's motions for a judgment notwithstanding the verdict and for a new trial. However, the trial court did order a remittitur of the damage awards to $1 million in compensatory damages[5] and $25 million in punitive damages.[6] In addition, the trial court awarded the Campbells $400,834.70 (forty percent of the compensatory damages award) for attorney fees and $400,747.78 for litigation expenses, totaling $801,582.48.

ISSUES AND STANDARDS OF REVIEW[7]

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4 The jury awarded $1.4 million to Mr. Campbell and $1.2 million to Mrs. Campbell.

5 The reduction resulted in an award of $600,000 to Mr. Campbell and $400,000 to Mrs. Campbell.

6 The trial court initially granted State Farm a remittitur or, in the alternative, a new trial. The Campbells accepted the remittitur.

7 We note that, in discussing the applicable standards of review in this case, we found Judge Norman H. Jackson's article in the Utah Bar Journal, 12 Utah Bar J. 8 (1999), especially helpful, and we recommend it to all

(continued...)

¶ 13 We list the issues and applicable standards of review in the order of their treatment in the analysis portion of this opinion.

1. Did the trial court commit reversible error in permitting an award of $25 million in punitive damages to stand?

a. In particular, State Farm argues that the $25 million punitive damages award is excessive under both Utah and federal law.

Standard of Review:

Under Utah law, seven factors must be analyzed to determine whether the amount of a punitive damage award is excessive. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 808 (Utah 1991) (*Crookston I*). We have heretofore reviewed the trial court's findings of fact regarding all but the seventh *Crookston I* factor under a clearly erroneous standard. *See State v. Pena*, 869 P.2d 932, 935 (Utah 1994). Because the seventh *Crookston I* factor involves the trial court's application of the law to the facts, we have in the past reviewed the trial court's determination for correctness, while at the same time affording the trial court some discretion as to the underlying facts. *See id.* at 936-39. Recently, however, the U.S. Supreme Court has imposed a new standard of review as a matter of federal constitutional law in punitive damages cases.[8] In *Cooper*

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[7] (...continued)
appellate practitioners.

[8] Although State Farm indicates in its statement of issues section that it is challenging the punitive damage award under the Utah Constitution, it has not in fact made (continued...)

Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), the Supreme Court held that federal due process requires federal appellate courts to review punitive damage awards de novo when they are challenged on constitutional grounds. *Id.* at 1682-83. In view of the applicability of fourteenth amendment standards to state courts, we adopt the de novo standard for reviewing jury and trial court conclusions under the *Crookston I* factors.

2. Did the trial court commit reversible error by admitting "other acts" evidence in violation of Utah Rule of Evidence 404(b)?

Standard of Review:

"[W]e review a trial court's decision to admit evidence under rule 404(b) of the Utah Rules of Evidence under an abuse of discretion standard. We review the record to determine whether the admission of other bad acts evidence was 'scrupulously examined' by the trial judge 'in the proper exercise of that discretion.' " *State v. Nelson-Waggoner*, 2000 UT 59, ¶16, 6 P.3d 1120 (quoting *State v. Decorso*, 1999 UT 57, ¶18, 993 P.2d 837) (footnote omitted).

3. Did the trial court commit reversible error by allowing the Campbells' experts to testify because they "usurp[ed] the function of the jury, g[a]ve irrelevant testimony, evade[ed] the hearsay rules, and testif[ied] without a proper foundation?"

Standard of Review:

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[8] (...continued)
such an argument, and we do not discuss that issue.

A trial court's decision to admit expert testimony is reviewed for an abuse of discretion. *Patey v. Lainhart*, 1999 UT 31, ¶33, 977 P.2d 1193; *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993). Furthermore, a trial court will not be reversed for an abuse of discretion unless "there is a reasonable likelihood that the verdict would have been different if the trial court had [excluded] the expert testimony." *Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1347 (Utah 1993).

4. Did the trial court commit reversible error in excluding evidence relating to the settlement agreement between Slusher and Ospital?

Standard of Review:
We review a trial court's decision regarding the relevancy of evidence under an abuse of discretion standard. *Bambrough v. Bethers*, 552 P.2d 1286, 1290 (Utah 1976) ("The trial court is given considerable discretion in deciding whether or not evidence submitted is relevant."); *State v. Harrison*, 805 P.2d 769, 780 (Utah Ct. App. 1991) (same).

5. Did the trial court commit reversible error by ruling that Mrs. Campbell has standing to pursue a bad faith claim?

Standard of Review:
This is a legal issue, and is reviewed for correctness. *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989).

6. Did the trial court commit reversible error by allowing Mrs. Campbell to recover for fraud when the evidence was insufficient to support her claim?

Standard of Review:
When considering challenges to jury verdicts based on insufficiency of the evidence, "we view the evidence in the

light most supportive of the verdict, and assume that the jury believed those aspects of the evidence which sustain its findings and judgment." *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 467 (Utah 1996) (internal quotation marks omitted). "If the evidence taken in the light most favorable to the verdict supports the verdict, we will affirm." *Steenblik v. Lichfield*, 906 P.2d 872, 875 (Utah 1995).

7a. Did the trial court commit reversible error by allowing both Mr. and Mrs. Campbell to recover for intentional infliction of emotional distress when the evidence was insufficient to support such claims?

Standard of Review:
See the standard of review for the previous issue.

7b. Are the remitted emotional distress awards of $600,000 to Mr. Campbell and $400,000 to Mrs. Campbell excessive?

Standard of Review:
We consider whether there is a "reasonable basis" to support the trial court's decision. *Crookston I*, 817 P.2d at 805.

8. Did the trial court commit reversible error in awarding attorney fees to the Campbells?

Standard of Review:
Whether attorney fees should be awarded is a legal issue that we review for correctness. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998). The amount of attorney fees awarded is reviewed for abuse of discretion in making such an award. *Id.*

9. Did the trial court commit reversible error in awarding more than $400,000 in litigation expenses without requir-

ing the Campbells to specifically demonstrate that such expenses were reasonable and necessary to their claim for compensatory damages?

Standard of Review:

The question of whether litigation expenses may be awarded in a bad faith action by an insured against an insurer is one of law, which we review for correctness. The standard of review as to the amount of such expenses is abuse of discretion. *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 460 (Utah 1993); *City Consumer Servs., Inc. v. Peters*, 815 P.2d 234, 240 (Utah 1991).

ANALYSIS

I. PUNITIVE DAMAGES

¶ 14 State Farm argues that the punitive damage award is excessive under both Utah and federal law. The Campbells cross-appeal, arguing that the trial court's remittitur of the amount of the punitive damages awarded was not required under Utah law. We consider the application of both the Utah and federal standards separately below.

¶ 15 At the outset, we note the guidelines for trial courts contained in *Crookston I*, 817 P.2d 789, 811-12 (Utah 1991). In upholding a punitive damages award, "the trial judge must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of the law and the facts," thereby "permit[ting] more effective and reasoned appellate review of the decision to uphold the award and to enable the appellate court to more carefully consider the various factors that may warrant punitives and the weight to be accorded them, while giving adequate deference to the advantaged position of the trial judge to appraise the witnesses and

the evidence." *Id.* at 811. We note that pursuant to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), we now review the factors de novo and do not defer to the trial court. When reducing an award of punitive damages, a trial court "should also explain its action" because "[t]he articulation of grounds for a remittitur ... should serve the same salutary purpose on appeal" furthered by requiring trial courts to articulate their grounds for upholding a punitive damages award. *Crookston I*, 817 P.2d at 811-12.

¶ 16 We commend the trial judge in this case for his exemplary compliance with these guidelines, and indeed for his meticulous, extensive, and very thorough written findings of fact and conclusions of law on all issues. This work by the trial judge has greatly enhanced our ability to review and organize a lengthy and complex record.

A. Utah Law

¶ 17 Both parties agree that the Utah law governing punitive damages was outlined in *Crookston I*, 817 P.2d 789 (Utah 1991), and *Crookston v. Fire Ins. Exch.*, 860 P.2d 937 (Utah 1993) (*Crookston II*). In *Crookston I*, the court announced the following factors to consider when awarding punitive damages:

> (i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded.

Crookston I, 817 P.2d at 808.

¶ 18 In analyzing the appropriateness of the jury's punitive damage award, the trial court applied the seven factors outlined in *Crookston I* and remitted the award based solely upon the seventh factor, believing that the damage ratio in that case created a legal limitation. Thus, although he required remittitur of the award, the trial judge observed that $25 million "may be viewed as artificially low in that it does not capture the full amount of harm done to the Campbells as a result of State Farm's misconduct." *Id.* at ¶92.

¶ 19 On appeal, State Farm objects to both the jury verdict and the remitted punitive damage award, citing the following language from *Crookston I*: "punitive damages awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and ... where the award is in excess of $100,000, we [the Utah Supreme Court] have indicated some inclination to overturn awards having ratios of less than 3 to 1." *Crookston I*, 817 P.2d at 810. Further, State Farm relies on the following elaboration from *Crookston II*:

> [i]t is certainly true that the punitive award here is without precedent in Utah, either as to the amount or as to the high ratio of punitive damages to hard compensatory damages. The presumption, therefore, is that the award is excessive. However, ..., this presumption may be overcome if the trial court explains why the case is unique in terms of one of the traditional seven factors or in terms of some other compelling factor.

Crookston II, 860 P.2d at 940 (citing *Crookston I*, 817 P.2d at 811).

¶ 20 According to State Farm, this language limits punitive damage awards to three times the amount of compensatory damages, unless the other *Crookston I* factors justify a higher

ratio--which in this case, State Farm argues they do not. Thus, State Farm asserts that the trial court erred in not ordering a new trial or remitting the punitive damage award to an amount within the 3:1 ratio. *Id.*

¶ 21 Conversely, the Campbells argue that the trial court placed undue emphasis on the seventh *Crookston I* factor. Because the other factors support a large punitive damage award, they assert that the seventh factor does not mandate a remittitur. *Id.* Instead, awards with higher than normal ratios of punitive to compensatory damages are simply cause for heightened judicial scrutiny to ensure that other factors support the large award. *Id.*

¶ 22 To determine whether the trial court erred, we consider all of the *Crookston I* factors. As discussed in the issues and standards of review section, we review the trial court's conclusions under the *Crookston I* factors pursuant to a de novo standard. *Cooper Indus.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674.

1. The Relative Wealth of State Farm

¶ 23 The defendant's wealth is the first factor for consideration. "Punitive damages ... should be sufficient to discourage ... [the defendant], or anyone similarly situated, from repeating such conduct in the future." *Cruz v. Montoya*, 660 P.2d 723, 727 (Utah 1983), *superseded by statute on other grounds*. To calculate an award sufficient to punish and deter companies from future egregious behavior, some courts have compared the amount of punitive damages to the company's net worth. For example, the Seventh Circuit Court of Appeals has held that a typical punitive damage award may be around one percent of the defendant's net worth. *Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n. 3 (7th Cir.1990). Although such guidelines are

helpful in reviewing punitive damage awards, we emphasize that in Utah there is no pre- established mathematical formula for such awards.

¶ 24 State Farm argues that Utah courts have considered a corporation's wealth only to mitigate large punitive awards, and that it is not aware of "any Utah appellate decision upholding a presumptively excessive punitive exaction on the ground that the defendant happened to be wealthy." In defense of this proposition, State Farm cites to *Cruz* and *VanDyke v. Mountain Coin Machine Distributors, Inc.*, 758 P.2d 962 (Utah Ct. App. 1988), two cases in which the appellate courts did in fact reduce the punitive damage award based on the defendant's wealth. However, neither of these cases holds that the wealth of a company can be considered only to mitigate a punitive damage award. To the contrary, they indicate that a fact finder should consider the defendant's relative wealth when calculating a punitive damage award, and that such awards should have a proportional relationship to the defendant's wealth. *See Cruz*, 660 P.2d at 726-27; *VanDyke*, 758 P.2d at 965-66.

¶ 25 Additionally, State Farm relies on two federal court cases, *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997), and *Utah Foam Products. Co. v. Upjohn Co.*, 930 F.Supp. 513, 531 (D.Utah 1996). These cases likewise do not support State Farm's position. In particular, while stating that a defendant's wealth "cannot alone" justify a large punitive damage award, *Utah Foam* indicates that a defendant's wealth may be taken into account. *Utah Foam*, 930 F.Supp. at 531 (internal quotation marks omitted). Moreover, *Continental Trend* specifically states that "wealth must remain relevant" when determining punitive damage awards. *Cont'l Trend*, 101 F.3d at 641.

¶ 26 State Farm's wealth is enormous. As the trial court found, "[t]he evidence indicates that State Farm's surplus increased from $2.65 billion in 1977 to $25 billion in 1995. Its assets increased from $6.3 billion in 1977 to $54.75 billion in 1995, at an average increase of $4.3 million per working day in surplus, and $9.3 million per working day in assets.... A punitive damages award equal to one percent of State Farm's wealth would be $547.5 million. The remitted amount of $25 million in punitive damages represents less that 1/20th of one percent of State Farm's wealth (.0457 per cent)." Moreover, the jury's punitive damage award of $145 million is only 0.26 of one percent of State Farm's wealth as computed by the trial court, to whose judgment on this factual matter we defer. In our view, neither percentage is unreasonable, given the need to sufficiently deter and punish State Farm. *See Crookston II*, 860 P.2d at 940-41 (upholding punitive damage award that was 0.5 of one percent of defendant's net worth). Furthermore, the evidence showed that a larger than normal punitive damage award is necessary to attract the attention of State Farm officials and deter the company from further bad conduct because, as the trial court specifically found: (1) State Farm's corporate headquarters had never learned of, much less acted upon, a punitive damage award of $100 million in a previous case; and (2) State Farm's Regional vice-president for Utah testified that there was no system in place to inform the company's national headquarters of any punitive damage award, and that he did not plan to report the award in this case.

2. The Nature of State Farm's Misconduct

¶ 27 This factor specifically analyzes the nature of the defendant's conduct in terms of its maliciousness, reprehensibility, and wrongfulness. It mirrors the "reprehensibility" factor described by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517

U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). There, the Supreme Court stated that the defendant's misconduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* at 575, 576, 116 S.Ct. 1589. Repeated "trickery and deceit" targeted at people who are "financially vulnerable" is especially reprehensible and worthy of greater sanctions. *Id.* Moreover, "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive" also warrant larger awards. *Id.* at 579, 116 S.Ct. 1589.

¶ 28 With these standards clearly in mind, the trial court made nearly twenty-eight pages of extensive findings concerning State Farm's reprehensible conduct. We summarize here three examples from those findings of State Farm's most egregious and malicious behavior.

¶ 29 First, State Farm repeatedly and deliberately deceived and cheated its customers via the PP & R scheme. *See* Court's Findings, Conclusions and Order Regarding Punitive Damages and Evidentiary Rulings, *Campbell*, at 17-27. For over two decades, State Farm set monthly payment caps and individually rewarded those insurance adjusters who paid less than the market value for claims. *Id.* at 18-19. Agents changed the contents of files, lied to customers, and committed other dishonest and fraudulent acts in order to meet financial goals. *Id.* at 17-27. For example, a State Farm official in the underlying lawsuit in Logan instructed the claim adjuster to change the report in State Farm's file by writing that Ospital was "speeding to visit his pregnant girlfriend." *Id.* at 35. There was no evidence at all to support that assertion. Ospital was not speeding, nor did he have a pregnant girlfriend. *Id.* The only purpose for the change was to distort the assessment of the value of Ospital's claims against State Farm's insured. As the trial court found, State Farm's fraudulent practices were

consistently directed to persons--poor racial or ethnic minorities, women, and elderly individuals--who State Farm believed would be less likely to object or take legal action. *Id.* at 26-27.

¶ 30 Second, State Farm engaged in deliberate concealment and destruction of all documents related to this profit scheme. *Id.* at 31-33. State Farm's own witnesses testified that documents were routinely destroyed so as to avoid their potential disclosure through discovery requests. *Id.* at 29-30. Such destruction even occurred while this litigation was pending. *Id.* at 30. Additionally, State Farm, as a matter of policy, keeps no corporate records related to lawsuits against it, thus shielding itself from having to disclose information related to the number and scope of bad faith actions in which it has been involved. *Id.* at 30.

¶ 31 Third, State Farm has systematically harassed and intimidated opposing claimants, witnesses, and attorneys. *Id.* at 33-37. For example, State Farm published an instruction manual for its attorneys mandating them to "ask personal questions" as part of the investigation and examination of claimant in order to deter litigation. *Id.* at 34. Several witnesses at trial, including Gary Fye and Ina DeLong, testified that these practices had been used against them. *Id.* at 34-35. Specifically, the record contains an eighty-eight page report prepared by State Farm regarding DeLong's personal life, including information obtained by paying a hotel maid to disclose whether DeLong had overnight guests in her room. *Id.* at 35. There was also evidence that State Farm actually instructs its attorneys and claim superintendents to employ "mad dog defense tactics"--using the company's large resources to "wear out" opposing attorneys by prolonging litigation, making meritless objections, claiming false privileges, destroying documents, and abusing the law and motion process. *Id.* at 36-37.

¶ 32 Taken together, these three examples show that State Farm engaged in a pattern of "trickery and deceit," "false statements," and other "acts of affirmative misconduct" targeted at "financially vulnerable" persons. *BMW*, 517 U.S. at 575, 576, 116 S.Ct. 1589. Moreover, State Farm has strategically concealed "evidence of [its] improper motive" to shield itself from liability, which was furthered by State Farm's treatment of opposing witnesses and counsel. *BMW*, 517 U.S. at 579, 116 S.Ct. 1589. Such conduct is malicious, reprehensible, and wrong.

¶ 33 State Farm responds by arguing in its brief that even if its conduct was wrong, it does not "after all, involve murder, torture, or deliberate poisoning of the environment," and thus cannot warrant millions of dollars in punitive damages. Additionally, State Farm argues that under *Crookston II*, willful calculated fraud was not sufficient to justify a higher than ordinary ratio of punitive to compensatory damages. *Crookston II*, 860 P.2d at 940.

¶ 34 State Farm fails to realize that, while *Crookston II* held that fraudulent conduct alone was insufficient to justify a large punitive damage award, it also observed that fraud combined with other factors justifies a higher award. *Id.* at 940-41. Specifically, *Crookston II* stated that "an additional unique factor justifying the punitive award, both in its dollar amount and in its proportion to the hard compensatory damages [is] ... the company's 'calculated and calloused attitude' toward settling valid claims." *Id.* at 941 (citation omitted). In this case, the jury was convinced, and the evidence shows, that State Farm engaged in a widespread pattern of fraud. Moreover, the evidence of its PP & R scheme demonstrates that State Farm specifically calculated and planned to avoid full payment of claims, regardless of their validity. Thus, the nature of State

Farm's conduct supports the imposition of a higher than normal punitive damage award.

3. Facts and Circumstances Surrounding State Farm's Misconduct

¶ 35 This factor looks to the circumstances surrounding the illegal conduct, particularly with respect to what the defendant knew and what was motivating his or her actions. *See Bundy v. Century Equip. Co.*, 692 P.2d 754, 759 (Utah 1984). Discussing this point, the trial court referred to its previous analysis of State Farm's conduct and stated "those facts speak for themselves with respect to the type of insensitive and callous behavior exhibited by State Farm." In addition to the trial court's findings, we note that State Farm refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case. Rather, testimony at trial indicated that State Farm was "proud" of the way it treated the Campbells. *Id.* Further, State Farm asserts that it is in fact a "victim" in this case because it is the target of a secret "conspiracy" perpetrated by the Campbells, Ospital, Slusher, and their attorneys to bring this bad faith lawsuit and to share any recovery obtained.

¶ 36 Even if we agreed with State Farm's characterization of the agreement between the plaintiffs and Ospital and Slusher, we are unable to comprehend State Farm's logic. No behavior by those parties operates to excuse State Farm's dishonest and illicit practices over the course of many years, nor its treatment of the Campbells. In fact, without this so-called "conspiracy," which contains no illegal elements whatever, State Farm's wrongdoing would have remained unexamined and unpunished, and the direct harm to the Campbells, the indirect harm to the other parties, and the harmful effect on the larger community of all those who deal with the company, would have had no remedy. The facts and circumstances surrounding

State Farm's misconduct all point to a scheme motivated by the goal of making a profit by any means necessary. We agree entirely with the trial court's conclusion that this factor supports the imposition of a higher than normal punitive damages award.

4. Effect of State Farm's Misconduct on the Campbells and Others

¶ 37 This factor examines how the defendant's conduct affected other people as well as the Campbells. The larger the number of people affected, the greater the justification for higher punitive damages.

¶ 38 Here, the effect of State Farm's conduct on the Campbells is well-documented. In particular, the Campbells lived for nearly eighteen months under constant threat of losing everything they had worked for their whole lives. This threat led to sleeplessness, heartache, and stress in the Campbells' marriage and family relationships. *Id.* State Farm argues that these were relatively minor impacts, and were not as severe as those punished in *Crookston II*, and additionally, that the alleged harms suffered by other State Farm customers cannot be considered in this case.

¶ 39 Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: "The harm is minor to the individual but massive in the aggregate." Moreover, State Farm's assertion that the trial court erred in considering alleged harms suffered by other customers is incorrect; *Crookston II* specifically allows courts to consider the effect of the defendant's conduct on others. *Crookston II*, 860 P.2d at 941. In fact, the *Crookston II* court justified a high punitive damage award based on the

fact that the insurance company's fraudulent practices were inflicted on countless customers. *Id.*

¶ 40 In the present case, State Farm's conduct seriously affected the Campbells, as indicated previously, as well as many others. In particular, State Farm's conduct corrupted its employees by forcing them to engage in deceptive practices or lose their jobs. Moreover, State Farm's continuing illicit practice created market disadvantages for other honest insurance companies because these practices increased profits. As plaintiffs' expert witnesses established, such wrongfully obtained competitive advantages have the potential to pressure other companies to adopt similar fraudulent tactics, or to force them out of business. Thus, such actions cause distortions throughout the insurance market and ultimately hurt all consumers. *Id.* Because State Farm's actions have such potentially widespread effects, this factor supports a high punitive damages award.

5. Probability of Future Recurrences

¶ 41 This factor analyzes the likelihood that the defendant will repeat or continue engaging in its wrongful behavior. A high probability of recidivism justifies a higher than normal punitive damage award. *BMW*, 517 U.S. at 577, 116 S.Ct. 1589. In light of State Farm's decades-long policy of fraudulent and dishonest practices in its handling of claims, it is difficult to imagine how such ingrained policies of corporate culture can be easily or quickly changed. This would be true even in a case where the perpetrator was fully aware of and remorseful for its conduct. State Farm has not exhibited any such self-awareness in this case. Instead, State Farm asserted at trial that its PP & R policy was "obsoleted" in 1992 and again in 1994. However, the Campbells' evidence showed that the policy was still being followed at the time of trial. *Id.*

¶ 42 State Farm challenged the Campbells' evidence by pointing out at trial that State Farm's regional vice president for Utah testified that he had sent "peace of mind" letters to customers assuring them that State Farm would protect them against personal exposure in third-party suits. However, as the trial court noted, "[t]he Court does not find it surprising that the jury apparently was not particularly persuaded that this repentance was genuine," especially in light of the fact that the vice president did not decide to send such letters until he "was in the office of trial counsel preparing for his trial testimony ... not long before the jury was to decide punitive damages."

¶ 43 In short, we are persuaded, as was the trial court, that "[g]iven the absence of credible evidence that, in fact, State Farm's policies have changed, and that the misconduct carried out toward Utah consumers during the past two decades has ended, the probability of recurrence of State Farm's misconduct appears extremely high."

6. Relationship of the Parties

¶ 44 This factor analyzes the relationship between the parties, specifically, the degree of confidence and trust placed in the defendant. The greater the trust placed in the defendant, the more appropriate the imposition of a large punitive damage award for a breach of that trust. A breach of a fiduciary relationship also supports a large punitive damage award.

¶ 45 In *Beck v. Farmers Insurance Exchange*, we noted that a fiduciary relationship exists between insurers and insureds like the Campbells because

> [i]n a third-party situation, the insurer controls the disposition of claims against its insured, who relinquishes any right to negotiate on his own behalf.... In essence, the

> contract itself creates a fiduciary relationship because of the trust and reliance placed in the insurer by its insured. The insured is wholly dependent upon the insurer to see that, in dealing with claims by third parties, the insured's best interests are protected.

701 P.2d 795, 799 (Utah 1985) (citations omitted). Because State Farm breached its duty in this fiduciary relationship, the trial court ruled that State Farm's actions warranted high punitive damages. *See Brown v. Coates*, 253 F.2d 36, 40 (D.C.Cir.1958) (holding that punitive damages are particularly appropriate when fiduciary duty is disregarded and exploited for gain).

¶ 46 State Farm argues that, although a fiduciary relationship exists, it is not an adequate basis for imposing a multi-million dollar penalty. Its argument is that because its breach of its fiduciary duty is the reason it is liable in tort in the first place, the breach cannot be "double-counted" as a justification for a large award. *Id.* at 86.

¶ 47 We disagree. The facts show that the Campbells trusted in and relied on State Farm's promises of protection and aid. For example, State Farm affirmatively promised the Campbells that it "would look out for their best interests" and that they should not procure their own counsel because State Farm would take care of them. Also, State Farm convinced the Campbells that "they had absolutely no risk," and even on the chance that they were found liable, they had adequate insurance to cover any potential liability. The Campbells relied on these promises: Inez Campbell actually transferred some of her separate property into joint ownership with her husband *after* the accident upon being told that there was no risk to Mr. Campbell of an excess judgment. The relationship of trust

between State Farm and the Campbells, and the breach of that trust, warrants a substantial punitive damage award.

7. Ratio of Punitive to Compensatory Damages

¶ 48 As noted above, the trial court reduced the jury's punitive damage award from $145 million to $25 million based solely on this factor. State Farm argues that this number is still grossly disproportionate to the harm suffered and should be reduced further according to the *Crookston I* ratio.

¶ 49 Applying the rationale and the language of both *Crookston* cases to this case, we reject State Farm's interpretation. First, contrary to State Farm's arguments, the ratio of punitive to compensatory damages is not determinative. It is simply one of the factors to be considered, none of which is more important or conclusive than another. *See Crookston I*, 817 P.2d at 808. *Crookston I* specifically stated that: "No relative weights have been assigned them [the factors], and no standards or formulas have been established for properly evaluating them." *Id.* A large award triggers a more searching judicial analysis of the situation to ensure the defendant's conduct warrants large punitive damages. However, if the other six factors support a large punitive damages award, a judge should not decrease the amount solely because of the ratio of punitive to compensatory damages. *Crookston II*, 860 P.2d at 940.

¶ 50 Second, both *Crookston I* and *Crookston II* rejected the idea of establishing a specific ratio or capping punitive damages, and emphasized that the guidelines for punitive damages need to be flexible enough to accomplish both the punishment and deterrent purposes of punitive damages. *See Crookston II*, 860 P.2d at 941; *Crookston I*, 817 P.2d at 809. In support of this reasoning, the *Crookston II* court noted that

> [i]f a company could predict that its systematic fraudulent conduct would evade detection in many instances and on those few occasions where it was discovered, would never result in punitive damages greater than the ratios we have historically upheld, it could carefully calculate the cost/benefit ratio of its wrongful conduct and avoid the deterrent potential of punitive damages. *Crookston II*, 860 P.2d at 941.

¶ 51 Finally, *Crookston II* itself was a case where the ratio of punitive to compensatory damages was higher than three to one. We upheld that award because of the willful, malicious, and fraudulent conduct of the insurance company towards the Crookstons and other similarly situated Utahns. *Crookston II*, 860 P.2d at 941. Since State Farm's conduct is of a similar nature, we hold that a ratio of greater than three to one is permissible here, and that the trial court erred in remitting the jury award. As long as the other factors sustain a high punitive damage award, as they do here, neither *Crookston I* nor *Crookston II* bars courts from imposing punitive damage awards greater than three times the amount of compensatory damages.[9]

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[9] It is worth noting that the trial court here issued a remittitur to $25 million, still twenty-five times the amount of the compensatory damages. Had the trial court complied with State Farm's interpretation of the *Crookston I* ratio factor, the remittitur would have been to an amount three times the amount of the compensatory damages--$3 million. It is apparent from the trial court's written findings that it would not have remitted the amount at all except for its mistaken belief that the jury's award exceeded proper limits as a matter of law

(continued...)

¶ 52 Based on the foregoing review of the seven *Crookston I* factors, we hold that, with the exception of its analysis of the seventh factor, the trial court's analysis is fully corroborated by our own. However, we conclude that the trial court erred in deciding that the seventh factor required remittitur as a matter of state law.

B. Federal Law

¶ 53 State Farm asserts that the standards set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), prohibit imposing the large amount of punitive damages awarded in this case. To "illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages," the *BMW* Court stated:

> Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.... States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.... Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

Id. at 568, 116 S.Ct. 1589 (citations omitted). The Supreme Court then identified "[t]hree guideposts" for consideration: "[1] the degree of reprehensibility of the [conduct]; [2] the disparity between the harm or potential harm suffered ... and

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9 (...continued)
under *Crookston I*.

[the] punitive damages award; and [3] the difference between this remedy [the punitive damage award] and the ... penalties authorized or imposed in comparable cases." *Id.* at 574-575, 116 S.Ct. 1589. Since the reprehensibility guidepost of the BMW test mirrors the second and third factors in *Crookston I*, relating to the nature and circumstances surrounding defendant's misconduct, we incorporate here our earlier analyses of these *Crookston I* factors, and conclude for the reasons discussed therein that the reprehensibility guidepost is met.[10] We analyze the second and third "guideposts" separately below.

1. Disparity Between the Harm and the Punitive Award (Ratio)

¶ 54 The most common means of determining whether a punitive damage award is excessive under federal law is to look at the ratio of punitive to compensatory damages. *See BMW*, 517 U.S. at 580, 116 S.Ct. 1589. However, when conducting such an analysis, there is no "simple mathematical formula," "categorical approach," or "constitutional line" for determining an appropriate punitive to compensatory damage ratio. *Id.* at 582, 116 S.Ct. 1589. In fact,

> low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

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10 Facts relevant to other *Crookston I* factors, such as factors four and six, may also satisfy the *BMW* reprehensibility guidepost.

Id. Overall, the ratio of punitive to compensatory damages needs to be reasonable considering the totality of the circumstances. *Id.* at 583; *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458-62, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (upholding punitive damage award that was 526 times amount of compensatory damage award because of potential harm that could have occurred had defendant's fraudulent scheme worked); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (upholding punitive damage award that was 200 times amount of plaintiff's out-of-pocket expenses based on reprehensibility of conduct and wealth of defendant).

¶ 55 Based on the language cited above, the trial court found that this *BMW* factor "does not impose a rigid cap on punitive damages awards" because in the Campbells' case, as in *TXO*, "the injury is hard to detect" and the potential for large harm is substantial. Specifically, the trial court relied on the following facts to justify the high punitive damage award: (1) State Farm never reported previous punitive damage awards to headquarters, even though prior awards included a Texas judgment of $100 million; (2) State Farm is an enormous company with massive wealth; (3) State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability; and (4) State Farm's policies have affected vast numbers of other Utah customers.

¶ 56 While not contesting the validity of the finding that it is likely to be punished at most in one out of 50,000 cases, State Farm does challenge the other three justifications. Because State Farm's objections to considering relative wealth and the effects on other Utah customers are identical to its arguments against the punitive damage award under *Crookston I*, we again incorporate by reference our previous analysis of

Crookston I factors one and four in section "IA" 1 and 4 of this opinion.

¶ 57 Turning to the remaining justification relied on by the trial court, we note that the court found that a prior $100 million punitive damage award against State Farm had not been reported to its national headquarters. State Farm argues that the award in this case need not be more severe than that award, citing *Johansen v. Combustion Engineering, Inc.*, for the proposition that "a punitive award does not need to be large enough to 'make the company newsletter' and need 'not attract the attention of the board of directors' in order to have a deterrent effect." 170 F.3d 1320, 1338 & n. 36 (11th Cir.1999), *cert. denied sub nom. Combustion Eng'g. Inc. v. McGill*, 528 U.S. 931, 120 S.Ct. 329, 145 L.Ed.2d 256 (1999). State Farm's reliance on *Johansen* is unfounded. First, unlike this case, *Johansen* did not involve punishing a company that had previously been assessed punitive damages for its illicit conduct. Rather, the punitive damage award issued in *Johansen* against the mining company was the first and only punishment imposed for its misconduct. *Id.* at 1336.

¶ 58 More importantly, State Farm misconstrues the holding of *Johansen*, which in fact stands for the proposition that larger awards are necessary for large corporations, and that company executives should be aware of imposed punitive sanctions. *See id.* at 1338-39. Specifically, *Johansen* states that

> in promoting deterrence, the economic wealth of a tortfeasor may be considered. A bigger award is needed to "attract the ... attention" of a large corporation. ... It is not unlikely that having to pay ... punitive damages would not make the company newsletter. *It should, however, attract the attention of whomever is in charge of the corporation's daily decisions* ... and would, no doubt, bear heavily upon

> regional or local managers where failure to regard consequences would be expected to subject their employer to loss.

Id. (citations and footnotes omitted and emphasis added).

¶ 59 Many large corporations are "entities too powerful to be constrained" by remedies provided by "criminal and civil law." Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U.L.Rev. 1269, 1329-30 & n.299 (1993). In many cases, the public's only protection against exposure to fraudulent harmful conduct by such large, powerful corporations is the threat that sanctions imposed for misconduct will be sufficiently severe. *Id.* If such a threat is unavailable, punitive damage awards against large entities will not serve their deterrent and punitive purposes. *See Crookston II*, 860 P.2d at 941.

¶ 60 State Farm points out that in the wake of *BMW*, many lower courts have held unconstitutional far lower ratios of punitive to compensatory damages than exist here. State Farm cites eighteen cases where courts have reduced punitive damage awards after conducting a *BMW* analysis. *Id.* at 77-78. In contrast, the Campbells cite nine other cases upholding punitive damage awards where the ratio of punitive to compensatory damages is larger than or the same as the ratio in this case.

¶ 61 All the cases agree, however, that each court must analyze the facts of each case to ensure that the defendant's acts

warrant the punitive damage award imposed.[11] In fact, the *BMW* court made it clear that the initial punitive damage award in that case (500 times the amount of plaintiff's damages) was not automatically invalid, but that it was unconstitutional because of the specific facts of the case--i.e. the fraud was perpetrated without "trickery or deceit," the available criminal and regulatory sanctions for comparable misconduct were minor, and some of the conduct for which BMW was being punished was legal in states other than Alabama. *BMW*, 517 U.S. at 582-84, 576-78, 572, 116 S.Ct. 1589.[12]

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11 The de novo standard of appellate review imposed by *Cooper Industries* underscores this principle.

12 That courts must analyze each case's facts to determine the appropriateness of the ratio is also demonstrated by the following cases, cited by State Farm: *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 504- 05 (8th Cir.1998) ("As an initial matter, the 24:1 ratio of punitive to compensatory damages is not unsettling as a matter of due process.... [However,] the nature and extent of the [defendant's] conduct does not support the jury's award [and] ... the effect on [the plaintiff] does not warrant" such an award); *EEOC v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir.1998) (reducing punitive damage award only "[a]fter considering the nature and extent of the misconduct, the impact on the individual plaintiffs, a reasonable relation between the compensatory and punitive damages, and an amount sufficient to punish and deter under all the circumstances"); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F.Supp. 513, 532 (D.Utah 1996) (reducing punitive damage award because, upon review of evidence at trial, "the punitive

(continued...)

¶ 62 Like *BMW*, this case contains exceptional facts and circumstances. Here, however, they support a higher rather than a lower punitive damage award. State Farm's fraudulent conduct has been a consistent way of doing business for the last twenty years, directed specifically at some of society's most vulnerable groups. The likelihood of further misconduct by State Farm is great, given the fact that it has not changed its conduct despite a previous $100 million punitive damage award. Moreover, the effect on the Campbells warrants a large award, given that they had to live in fear of complete financial ruin for over eighteen months because of State Farm's refusal to settle their claim. Finally, the harm propagated by State Farm is extreme when compared to the statistical probability that State Farm is likely to be required to pay damages only once in 50,000 cases. Thus, because there are reasonable justifications for the large punitive damage award based upon the specific facts of this case, the ratio factor in BMW does not require the award to be reduced simply because the ratio of punitive to compensatory damages is high.

2. Civil or Criminal Penalties Authorized in Comparable Cases

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12 (...continued)
damages award does not appropriately reflect the level of Upjohn's misconduct. Decidedly, no egregious conduct was presented which would justify the amount of the award based upon clear and convincing evidence"); *Apache Corp. v. Moore*, 960 S.W.2d 746, 749 (Tex.App.1997) (noting that "the ratio that will pass constitutional muster will depend upon the facts in each case").

¶ 63 The final factor for determining whether a punitive award is excessive under federal law is to "[c]ompar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583, 116 S.Ct. 1589. Possible imprisonment for such conduct is a strong indication that the conduct warrants high punitive damages. *Id.*

¶ 64 The trial court found that this factor "does not require reduction of the punitive damage award" because the "penalties that could be imposed under Utah law for the fraudulent scheme that has been pursued by State Farm are enormous." Specifically, the trial court found that State Farm could be forced: (1) to pay a $10,000 fine for each act of fraud under Utah Code Ann. §§ 31A-26-301 *et seq.*; (2) to renounce its business license or have its Utah operations dissolved under Utah Code Ann. §§ 31A-26-213, 76-3-201(2) and (3), 76-10-1602(ppp), and 76-10-1603.5(5); (3) to disgorge all the illicit profits gained by the scheme, plus pay a fine of twice the value of those profits, under Utah Code Ann. §§ 76-10-1602 *et seq.*; and (4) to publically acknowledge that its officers had been convicted of fraud under Utah Code Ann. § 76-3-303. Moreover, under Utah Code Ann. § 76-3-303, State Farm's officers could be imprisoned or removed for up to five years, an extremely important consideration for the *BMW* court. *BMW*, 517 U.S. at 584, 116 S.Ct. 1589.

¶ 65 State Farm disputes these findings, arguing that since this case is the "only bad faith action against it in the last fifteen years," there is no evidence that it has defrauded customers or gained illicit profits. Moreover, State Farm argues that even if it could be punished for its practices, permissible punishment is limited by the "actual fining practice" of the Insurance Commission. *Id.* at 83.

¶ 66 State Farm's logic is unpersuasive for several reasons. First, such an interpretation runs contrary to the clear language of *BMW* indicating the Court was examining "the civil or criminal penalties that *could* be imposed for comparable misconduct," not other punishments already issued against the defendant. *BMW*, 517 U.S. at 583, 116 S.Ct. 1589 (emphasis added).

¶ 67 Second, State Farm's argument that there is no evidence of fraud is contrary to the trial court's findings and to the evidence that we have reviewed supporting those findings. It is difficult to understand how State Farm can argue that there is no evidence that it committed fraud or acted illicitly when the record contains volumes of such evidence. The evidence was so extensive and convincing that it took the trial court nearly twenty-eight pages to summarize it in his findings on the post-trial motions.

¶ 68 Finally, State Farm's argument that the Insurance Commission's practices in assessing fines are applicable, rather than the maximum statutory penalties, is contrary to *BMW*. The *BMW* court clearly indicated that the punitive award was to be compared to legislatively set penalties, not administrative agency practices. *BMW*, 517 U.S. at 584, 116 S.Ct. 1589. For example, the Supreme Court stated that it was examining "the statutory fines" and "[t]he maximum civil penalty authorized by the Alabama Legislature." *Id.* Moreover, *BMW* also stated that a "reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to *legislative* judgments concerning appropriate sanctions for the conduct at issue." *Id.* at 583, 116 S.Ct. 1589 (internal quotation marks omitted and emphasis added). We conclude that the trial court correctly found that a large punitive damage award was justifiable under this third guidepost.

¶ 69 In conclusion, we hold that the trial court's analysis of the punitive damage award under *BMW* was correct. In light of the foregoing analysis of state and federal law, we vacate the trial court's remittitur order and reinstate the jury's verdict awarding $145 million in punitive damages.

II. OTHER ACTS EVIDENCE

¶ 70 State Farm argues that large quantities of "other acts" evidence were admitted in violation of the Utah Rules of Evidence because such evidence had nothing to do with State Farm's handling of third-party claims in general, or State Farm's conduct toward the Campbells in particular, and therefore had no probative value. State Farm catalogs a long list of allegedly inadmissible evidence on which it bases its argument that the evidentiary process in the trial court was tainted.[13] In contrast, the Campbells argue that State Farm did not properly preserve its evidentiary objections and that, even

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13 In particular, State Farm argues that the following evidence was not admissible:

1. Evidence relating to first-party property claims;
2. Unsubstantiated allegations in class action lawsuits;
3. Verdicts in first-party cases;
4. Evidence of the conduct of a non-party sister company;
5. Evidence that State Farm employed predictable experts;
6. Evidence that State Farm engaged in hard ball litigation tactics;
7. Evidence that State Farm strongly encouraged first-contact settlements; and
8. Evidence showing that State Farm discriminated on the basis of sex and race.

if it had, the trial court did not exceed its discretion in admitting the "other acts" evidence.

¶ 71 We decline State Farm's invitation to take a piecemeal approach to the analysis of the admissibility of the "other acts" evidence in this complex and lengthy litigation. Just as any able litigator must have a "theory of the case" if he or she hopes to convince a fact finder of the merits of a particular action, it is crucial for a trial judge confronting a case with so many issues and opportunities for mistake to have an overall view of the necessary balance for fairness to the parties in the conduct of the trial, particularly as this relates to the admission and exclusion of evidence. The trial court in this case had such a vision, and we believe it achieved balance and fairness.

¶ 72 First and foremost, the trial court granted State Farm's request, over the Campbells' strenuous objections, to take the unusual step of bifurcating the trial.[14] The trial court imposed stringent evidentiary restrictions on the Campbells during phase I of the trial, so that only State Farm's treatment of *the Campbells* was at issue in establishing its bad faith in handling their claim. *Id.* In a post-trial ruling, the trial court stated that it "understood that the purpose of [the] bifurcation order was to separate the so-called 'bad-faith phase' (phase I) from what the parties termed the 'institutional phase' of this trial (phase II)." The trial court continued: "State Farm prevailed in its bifurcation arguments largely by pointing out that phase II, covering the institutional evidence, would involve a very lengthy trial, as it would deal with State Farm's *corporate policies and practices*--so that bifurcation would save substantial resources

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[14] The trial judge was actually upholding an earlier bifurcation order by predecessor Judge John Rokich.

in the event that the jury found no bad-faith claim handling." (Emphasis added.)

¶ 73 The other major decision that the trial court made, on which State Farm's arguments regarding error in the admission of "other acts" evidence largely succeed or fail, was the admission of evidence related to its PP & R policy. This policy, initiated in 1979 by the company's highest executives, set fixed ceilings on the payment of claims in order to increase corporate profits. After phase I established that State Farm had handled the Campbells' claim in bad faith and had breached its fiduciary duty to them, State Farm defended itself in phase II by claiming that its actions were only the result of an "honest mistake" or an isolated lapse in judgment. Based on this defense, the trial court denied State Farm's request to exclude all evidence from which the jury could infer that the Campbells were the victims of an extensive, intentional scheme to defraud State Farm's policyholders. All of the other categories of evidence State Farm challenges as being erroneously admitted during phase II of the trial, from the practice of office competitions to lower average claims paid, to the discriminatory treatment of insureds based on gender, race, economic status, educational background, and age, were part and parcel of its PP & R policy.

¶ 74 In this context, we conclude that we must consider the evidence in an integrated fashion and analyze whether the trial court erred in admitting the "other acts" evidence in general. State Farm's challenge to the trial court's admission of such evidence is controlled by Utah Rule of Evidence 404(b), which states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

Thus, "in deciding whether evidence of other crimes is admissible under rule 404(b), the trial court must determine (1) whether such evidence is being offered for a proper, noncharacter purpose under 404(b), (2) whether such evidence meets the requirements of rule 402, and (3) whether this evidence meets the requirement of rule 403." *State v. Decorso*, 1999 UT 57, 20, 993 P.2d 837. When reviewing such decisions, we apply "an abuse of discretion standard ... [and consider] the record to determine whether the admission of other bad acts evidence was 'scrupulously examined' by the trial judge 'in the proper exercise of [his or her] discretion.' " *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 16, 6 P.3d 1120 (quoting *Decorso*, 1999 UT 57 at ¶ 18, 993 P.2d 837).

A. Noncharacter Purpose

¶ 75 "Under the first part of this analysis, the proponent must demonstrate that the evidence is actually being offered for a proper, noncharacter purpose, such as those specifically listed in ... rule [404(b)]." *Decorso*, 1999 UT 57 at ¶ 21, 993 P.2d 837. Although the list of noncharacter purposes found in rule 404(b) is helpful, it is not exclusive. *See* Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* 4-41 (1996).

¶ 76 Phase II of the trial involved the Campbells' claims of fraud, intentional infliction of emotional distress, and punitive damages, and State Farm's defense that its mistreatment of the Campbells was unintentional and simply the result of an honest mistake. In this context, the trial court found that the Campbells' evidence, which State Farm now challenges on appeal, was offered for many noncharacter purposes, including establishing State Farm's intent, reckless disregard, absence of mistake, plan, and outrageous conduct, as well as rebutting State Farm's defense. Comparing the elements necessary to establish the Campbells' claims and to rebut State Farm's defenses with the evidence State Farm finds objectionable, we conclude that the trial court was entirely correct in finding that such evidence was offered for noncharacter purposes. Moreover, based on our review of the record, which indicates that the trial court made its conclusions only after reviewing numerous motions in limine made by State Farm and conducting at least ten pretrial hearings that consumed more than fifteen days, we are satisfied that the trial court scrupulously examined the "other acts" evidence ultimately admitted at trial. Once again, we have been greatly assisted in our review by the trial court's extended written findings in his orders on the pretrial motions. Accordingly, we conclude that the trial court did not exceed the permitted range of discretion in finding that the "other acts" evidence was offered for a proper, noncharacter purpose.[15]

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15 It is not entirely clear to us that the conceptual considerations related to "character" under rule 404 translate freely from the cases we have decided involving an individual's character to the "character" of a corporation. Both parties in this case have briefed the issue without any attention to potential distinctions, however, and so for purposes of this case, we assume (without deciding) that the analysis should be identical.

B. Rule 402

¶ 77 Under rule 402, "other acts" evidence, like all evidence, must be relevant or it is not admissible. Utah R. Evid. 402 ("All relevant evidence is admissible.... Evidence which is not relevant is not admissible."). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401. Thus, to be admissible, "other acts" evidence must tend to prove some fact that is material to the cause of action alleged--other than the defendant's propensity to engage in actions in conformity therewith. *Decorso*, 1999 UT 57 at ¶ 22, 993 P.2d 837.

¶ 78 After careful consideration, the trial court specifically concluded that the "other acts" evidence to which State Farm presently objects was "relevant," "helpful," and "of high probative value" because such evidence was necessary to establish several elements of the Campbells' claims and to rebut State Farm's defenses. Our review of the record makes it clear that the trial court's statement regarding the necessity of the "other acts" evidence is amply supported therein. Notably, one of the chief concerns of rule 402 is not even present in this case, namely the need to ensure that fact-finders will not infer wrong-doing in a present scenario because an actor has done wrong in the past. Phase I of this trial conclusively established that State Farm acted in bad faith; its wrong-doing was thus determined without *any* reliance on past deeds or general practices. The only issue in Phase II was the nature of appropriate compensatory and punitive damages to be imposed in response to the wrong-doing. For that purpose, State Farm's intent, motive, and rationale for its wrong-doing was extremely relevant, and the evidence of its long-established methods of doing business were, as the trial court found, highly probative.

¶ 79 Surprisingly, even in the face of the trial court's detailed findings and analysis, State Farm asserts on appeal that the "other acts" evidence had no probative value. We find this assertion troubling. State Farm's failure to acknowledge the probative value of the "other acts" evidence is of a piece with its inability to acknowledge that it engaged in a wide-spread corporate scheme to defraud its insureds, a scheme that had far-reaching negative effects on both its insureds and society in general. Because the trial court had a reasonable basis in the evidence for its decision, we reject State Farm's assertion, and conclude that the trial court did not abuse its discretion in finding evidence of State Farm's "other acts" relevant. *See Crookston II*, 860 P.2d 937, 938 (Utah 1993) ("[W]e reverse only if we find an abuse of discretion, i.e., no reasonable basis for the decision.")

C. Rule 403 Analysis

¶ 80 Rule 403 requires that "we weigh the probative value of the evidence with the potential for creating prejudice in the minds of the jurors." *State v. Reed*, 2000 UT 68, ¶ 29, 8 P.3d 1025. The rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403. In assessing whether prior acts evidence satisfies the requirements of rule 403,

> a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of

> time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Reed, 2000 UT 68 at ¶ 29, 8 P.3d 1025.

¶ 81 In ruling upon State Farm's various evidentiary motions, the trial court found that in light of the phase I jury verdict against State Farm, "the pattern and practice evidence is of high probative value and importance to plaintiffs' claims, and that serious prejudice to plaintiffs would result if such evidence were excluded. The court further finds that the probative value is not outweighed by the danger of unfair prejudice or confusion." The trial court made it clear, however, that it was not precluding further rule 403 objections to exclude *specific* evidence. Rather, it found only that objections to specific evidence based on the "general issues of wrongful pattern and practice evidence" would be improper.

¶ 82 We find compelling reasons under rule 403 to uphold the trial court's denial of State Farm's request to generally exclude all "other acts" evidence related to its patterns and practices. As discussed above, the alleged wide-ranging effects of State Farm's PP & R policy were crucial to the Campbells' ability to prove their fraud, intentional infliction of emotional distress, and punitive damage claims. State Farm attacks the trial court's evidentiary rulings repeatedly for allowing evidence that was "dissimilar" from the facts in the Campbells' case; this once again misses the mark. The underlying purpose of rule 403 is to assure a careful consideration of prior acts and, in the event that the evidence passes the rule 404(b) threshold, to continue to evaluate the evidence in light of its potentially prejudicial effect. Although the "similarity" language of *Reed* and earlier cases is not particularly apt in this case, we think

that its general concerns were accounted for in the trial court's reasoning underlying his determinations of the admissibility of the "other acts" evidence. State Farm's PP & R policy exposed the Campbells to an excess judgment and the accompanying risk of losing all their assets. Thus, cause and effect became very important. In other words, the relevant inquiry in phase II was: What caused the Campbells' harm? Without the evidence of State Farm's PP & R policy, and evidence of practices flowing from that policy, the Campbells would have been unable to prove the real cause of their harm. The establishment of this cause and effect link was highly dependant on the "other acts" evidence of State Farm's methods of doing business.

¶ 83 State Farm also contends that the time interval factor was not met here because some of the evidence detailed behavior remote in time. However, inasmuch as there was affirmative evidence adduced tending to show that State Farm's practices were ongoing at the time of the trial (which evidence was explicitly believed by the trial court and apparently by the jury), we find that contention without merit. In light of these considerations, the trial court did not abuse its discretion in ruling that the probative value of the "other acts" evidence was not outweighed by any potential prejudice.

III. EXPERT TESTIMONY

¶ 84 State Farm objects that the testimony by the Campbells' experts "went far beyond the realm of permissible expert testimony, instead crossing the line into rank advocacy," and thus violated rules 702 and 703 of the Utah Rules of Evidence. Conversely, the Campbells argue that, at most, only two of State Farm's objections were preserved for appeal and that, in any case, the trial court did not commit reversible error. "It is well established that trial courts have wide discretion in determining the admissibility of expert testimony." *State v.*

Kelley, 2000 UT 41, ¶ 11, 1 P.3d 546. Moreover, unless "there is a reasonable likelihood that the verdict would have been different if the trial court had [excluded] the expert testimony," we will not reverse the trial court's decision. *Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1347 (Utah 1993). While there appears to be merit to the Campbells' argument that State Farm failed to preserve many of its objections to the experts' testimony, we deem it more efficient to analyze the substance of State Farm's challenges generally, first under rule 702, and then under rule 703.

¶ 85 To rebut State Farm's "honest mistake" defense, the Campbells called experts Stephen Prater and Gary Fye. These men were intimately acquainted with the intricacies of the insurance industry and with State Farm's practices in particular. Their qualifications as experts were not challenged by State Farm. Their testimony focused upon explaining State Farm's PP & R policy and demonstrating its far-reaching effects. State Farm now argues that much of this testimony was without foundation and was prejudicial. In particular, State Farm challenges the experts' testimony concerning the company's excess liability handbook, its failure to maintain statistics on excess verdicts, the profits it derived from improper claims handling, and the effects of its PP & R policy and related practices on the insurance industry in general. State Farm also argues that Mr. Prater impermissibly testified to legal conclusions.

¶ 86 Utah Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

> [T]he question that must be posed prior to the admission of any expert evidence is whether, on balance, the evidence will be helpful to the finder of fact." *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993) (internal quotation marks omitted). Helpfulness depends upon "whether the subject is within the knowledge or experience of the average individual." *Id.* However, "[i]t is not necessary that the subject of the testimony be so erudite or arcane that the jurors could not possibly understand it without the aid of expert testimony, nor is it a requirement that the subject be beyond the comprehension of each and every juror." *Id.* "This 'helpfulness standard' also implicates Rule 403 considerations, since if the evidence is confusing or unfairly prejudicial it will hinder rather than aid jury decision making." Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* 7-9 (1996) (clarifying that "Rule 403 is not being applied directly, so ... the question is 'helpfulness,' not whether the probative value is greatly outweighed by confusion or prejudice"); *see also Larsen*, 865 P.2d at 1363 n. 12; *State v. Rimmasch*, 775 P.2d 388, 398 n. 8 (Utah 1989). We have reviewed the entire transcript of both Prater's and Fye's trial testimony. With the exception of the argument concerning legal conclusions, we find it unnecessary to address with particularity State Farm's specific challenges.

¶ 87 That the experts' testimony was helpful is evident. State Farm conceded the witness' qualifications. Although the rule does not require that the issue to which an expert testifies be arcane, the issues raised in this case were in fact quite difficult for the average person to understand. The experts' familiarity with the insurance industry in general, and State Farm in particular, must have greatly aided the jury's understanding of the issues. Moreover, our review of the record satisfies us that the experts' testimony, given its relevance and its helpfulness, did not raise any concerns under rule 403 sufficient to warrant exclusion. Thus, because the experts'

testimony was helpful to the jury, the trial court did not abuse its discretion under rule 702.

¶ 88 We now turn to State Farm's specific challenge under rule 702 which argues that Prater usurped the trial court's role of instructing the jury by impermissibly offering legal conclusions while testifying. Most of State Farm's objections address Prater's testimony concerning industry standards. In several instances he described "duties" and "standards" of behavior or of "care" that should dictate the practice of insurance companies generally. In every instance, and sometimes following objections by State Farm, it was made very clear to the jury by the phrasing of the question and/or by comments from counsel and the court, that the witness was testifying only to prevailing standards of conduct in the industry, and not to legal standards or rules of law. In at least one instance, the trial court clarified for the jury the role of the court in instructing them on the law, the limited role of the experts, and properly instructed the jury at the end of the trial. The trial court did not abuse its discretion in permitting the testimony in question.

¶ 89 Finally, State Farm objects because Prater pointed to boxes of documents in the courtroom and testified that those documents supported his conclusion that State Farm engaged in a pattern of cheating on claims. This challenge is governed by rule 703, which states

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

This court has held

> "[O]nce the expert is qualified by the court, the witness may base his [or her] opinion on reports, writings, or observations not in evidence which were made or compiled by others, so long as they are of a type reasonably relied upon by experts in that particular field. The opposing party may challenge the suitability or reliability of such materials on *cross-examination*, but such challenge goes to the *weight* to be given the testimony, not to its admissibility."

Patey v. Lainhart, 1999 UT 31, ¶ 30, 977 P.2d 1193 (quoting *State v. Clayton*, 646 P.2d 723, 725 (Utah 1982)) (emphasis added). The policy behind the current iteration of this rule is aimed at broadening the permissible bases of expert opinion. One justification driving this policy is to lessen " 'the expenditure of substantial time in producing and examining various authenticating witnesses.' " *Id.* (quoting note of advisory committee to federal version of rule 703, which is identical to Utah's rule 703).

¶ 90 Applying rule 703, we find that Prater's testimony concerning the documents were not improper because such documents were "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Utah R. Evid. 703; *see also Am. Concept Ins. Co. v. Lochhead*, 751 P.2d 271, 274 (Utah Ct. App. 1988) (finding that expert in licensed property and casualty claims properly relied upon his examination of adjuster's file, since this was "material[ ] of a type usually relied upon by experts in his field").

¶ 91 Prater described the nature of the documents in his files, the means by which he had obtained them, and the fact

that he had reviewed and was familiar with their contents. He testified that the vast majority of the documents were original State Farm documents or copies thereof. He further testified that his conclusions and opinions in this trial were based in part on his study of the documents.

¶ 92 State Farm complains that cross-examining Prater on these documents would have entailed more time than it was allotted for trial. In our view, however, extra time was not the issue. Cross-examination of Prater on the documents in the boxes was not a relevant task for State Farm. On the contrary, State Farm had a duty to locate and produce documents critical to challenging Prater's testimony and to conduct an effective cross-examination within the known time constraints. Because State Farm had itself produced most of the documents, we presume (as did the trial judge) that it knew their contents. It cannot now claim error because its own trial strategy did not produce favorable results.[16] Accordingly, we find that the trial court did not abuse its discretion in admitting Prater's testimony.

IV. SETTLEMENT AGREEMENT

¶ 93 As described briefly in the background portion of this opinion, Slusher and Ospital entered into a settlement agreement prior to the trial of the initial lawsuit in Logan, Utah, to determine liability in the underlying accident. Their agreement was reflected in two separate documents, both dated June 3, 1983. In the first, entitled "Release of Claims," Slusher accepted $65,000 in return for a release of all claims against Ospital and Ospital's insurers. The release expressly preserved Slusher's claims against Campbell and his insurers (who were in any event not parties to the release). The second agreement, which we will refer to as the Bad Faith Agreement, required Ospital to "assist Slusher in the prosecution of his claim against any other party responsible for said injuries and damages, including any claim for bad faith against any insurer of the responsible party." It specifically required Ospital to remain as a party in the Logan case (in which Ospital had a cross-claim against Campbell in addition to Slusher's claims against Campbell) and provided for some sharing of any recovery over and above Slusher's damages as determined by the jury in that case. *Id.*

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16 Additionally, we note that the trial court was very responsive to State Farm's request for additional time when it claimed the necessity of adding rebuttal witnesses regarding a different aspect of the trial. In fact, at that juncture, the trial court doubled the amount of trial time allotted. We are confident that the trial court would have done the same had State Farm convincingly presented such a need regarding these documents.

¶ 94 In the Logan trial and in both phase I and phase II of the trial at issue in this appeal, State Farm sought admission of the details of that agreement in evidence. State Farm's theory on all three occasions was that, because the settlement required Ospital to remain in the original lawsuit, Ospital and Slusher were permitted to "gang up" on Campbell in the liability determination process. State Farm wished to rely on the agreement as evidence of "collusion" in the Logan trial, which it wanted to argue to the jury in this trial had increased the severity of the liability percentage assigned to Campbell in the original lawsuit, and should therefore mitigate the evidence of bad faith in phase I and support its theory of "innocent mistake" in phase II. The trial judge rejected State Farm's rationale and precluded use of the settlement agreement. We agree with the trial judge.

¶ 95 The record in this case establishes that State Farm was informed, prior to the Logan lawsuit, that Slusher would seek a unilateral settlement with Ospital if State Farm continued to refuse to participate in a settlement. On the day the Logan trial began, counsel for Slusher told the trial court and State Farm counsel that the terms of the agreement included, in addition to a release of Slusher's claims against Ospital in return for a payment of $65,000, "cooperation" between Slusher and Ospital in the event of a future bad faith action against State Farm. State Farm's counsel immediately informed the trial court that he feared collusion at trial between Ospital and Slusher to place blame for the accident on Campbell. The trial court declined to admit evidence of the settlement agreement.

¶ 96 After verdict in the Logan trial, the trial court, on Campbell's motion for a new trial, explained at length its rationale for excluding the liability release agreement from the trial. The court's memorandum decision observed specifically that Campbell's counsel had requested admission of this agreement and an instruction to the jury that "Ospital and Slusher were no longer in an adversary position with one another," and that he would be "facing the position where counsel for Ospital and Slusher were in collusion against Campbell and the way they could now conduct trial would affect the outcome to the prejudice of Campbell." This is of course exactly the argument State Farm now raises about the Bad Faith Agreement (the basic terms of which had been disclosed at the outset of the liability trial even though it was not shown to the court or counsel). Responding to that argument, the trial judge wrote:

> As to any collusion, this Court was present and observed the whole trial, observed no collusion between attorneys for Ospital and Slusher. In fact, Counsel for Slusher questioned all witnesses of both Campbell and Ospital as

> though adversary to his position that Slusher was not negligent, had no liability, and that he didn't know who was liable but it had to be one or the other defendant or both.

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¶ 97 After reading the Bad Faith Agreement in its entirety for the first time, the trial court subsequently took the extraordinary step of executing an affidavit in May of 1996, containing the following assertions:

> 6.... I do not believe the second agreement [the Bad Faith Agreement] posed any risks or caused any alteration of the parties' positions at trial different from those already created by the first agreement [the Release of Claims].
> 7. Because of my awareness of the first agreement during the trial, I was careful to watch for any signs of improper collusion or other improper conduct by Slusher, Ospitals or their counsel at trial. I saw no such conduct. I also saw no signs of efforts by Slusher, Ospitals or their counsel to work together to gain unfair advantage over Campbell and his counsel.
>
> 8. The statements and finding I made after the trial in the Memorandum decision issued in November, 1983 ... were and are accurate.

¶ 98 This court, on appeal of the Logan verdict in *Slusher v. Ospital*, 777 P.2d 437, 438 (Utah 1989), concluded that the trial court erred in not "disclosing the settlement" to the jury. After analysis of the totality of circumstances at trial, however, we held that "the disclosure of the settlement agreement to the jury would not have had any effect on the outcome of trial." *Id.* at 445. While our reference to "the settlement agreement"

arguably referred only to the Release of Claim document, there is nothing in the separate Bad Faith Agreement that would have differently affected the incentives of the parties or probabilities of collusion between Ospital and Slusher at trial.

¶ 99 Thus, the existence and/or prejudicial effect of alleged collusion between Ospital and Slusher at the Logan trial was effectively raised and decided in that case. Furthermore, State Farm explicitly disavowed in phase I of this trial any intent to rely on an argument that it had been the target of collusion in the Logan trial. It stipulated to the exclusion of the settlement evidence in phase I and cannot now complain of the trial judge's ruling in that regard.

¶ 100 As to phase II, the trial court relied on rule 403 of the Utah Rules of Evidence to exclude the settlement agreement, finding that it had "little, if any, probative value," and "any probative value it may have is far outweighed by the unfair prejudice to plaintiffs that would result and the danger of confusion of the issues and misleading the jury." It having been conclusively established in the liability trial and subsequent appeal that there was in fact no evidence of actual collusion at the Logan trial, the settlement agreement between Slusher and Ospital simply had no relevance to the claims of Campbell against State Farm, and the trial judge was entirely correct in precluding its admission.[17]

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[17] Oddly, despite the trial court's ruling on this issue, the jury did in fact see the Bad Faith Agreement in phase II. State Farm's counsel conducted the following inquiry of Campbells' expert James Crandall:

Q: ... Just before the lunch break, I was asking you about your awareness through the documentation of an

(continued...)

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[17] (...continued)

agreement in June of 1983 between Mr. Ospital, or the Ospitals, and Mr. Slusher about suing State Farm if they got an excess verdict.

A: Okay.

Q: And you're aware of that?

A: I have a general recollection of it.

Q: *We have this document already in evidence, and it's on June 3rd of 1983, between Robert Slusher, Junior, and the estate of Todd Ospital and Allstate.* And it said, it says here that, "Ospital and the attorneys currently retained by Ospital shall assist Slusher in the prosecution of his claim against any other party responsible for said injuries and damages, including any claim for bad faith against any insurer of the responsible party." Do you see that?

A: Yes.

Q: So before the case went to verdict, which was September of '83, Ospitals and Slushers agreed that they would go together and sue State Farm for bad faith.

A: Under certain circumstances. They agreed to settle as between each other, which is common, and under certain circumstances, to proceed further.

Q: But the important thing is, you're aware, as a law professor, that Ospital and Slusher didn't have a direct right to sue State Farm.

A: That's right. Not for the bad faith claim, that's right. Because it only runs to the Campbells.

Q: So when Ospital and Slusher got excess verdicts against Mr. Campbell, they needed Mr. Campbell to be the party to bring the lawsuit. (Emphasis added).

(continued...)

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17 (...continued)
Thus, the Bad Faith Agreement was admitted into evidence, and the jury was informed of its provisions. It came in without objection as Exhibit 41 during the cross-examination of Paul Brinkman, a witness for the plaintiffs, and its pertinent terms were read to the jury. After a subsequent objection by plaintiffs, based on the trial court's exclusion of the agreement in the pretrial motion in limine, State Farm agreed to the withdrawal of Exhibit 41; nevertheless, counsel for State Farm referenced the agreement in closing argument:

So they confirm that again and then in June of 1983, couple of weeks later, the agreement is signed on June 3rd, 1983, where Slusher, the Ospitals, their counsel and Allstate agree down here in paragraph three that they're going to assist in prosecuting a claim for bad faith against any insurer of the responsible party. And then you get down to paragraph four and they set out how this is going to happen, how this is going to work. And when you go over to paragraph four on page two they talk about splitting up the excess recovery half and half with respect to any general and punitive damages recovered in a bad-faith claim.

Now, this is an agreement, ladies and gentlemen of the jury, a contract, I guess you could call it, whereby Ospital and the Slushers agreed to pursue a bad-faith action against State Farm, which they couldn't pursue without Mr. Campbell giving them some kind of cooperation because by law they can't pursue it.

....

(continued...)

V. MRS. CAMPBELL'S FRAUD CLAIM

¶ 101 State Farm argues that there was no basis for the jury to find by clear and convincing evidence that State Farm had an intent to defraud Mrs. Campbell. When considering challenges to jury verdicts based on insufficiency of the evidence, "we view the evidence in the light most supportive of the verdict, and assume that the jury believed those aspects of the evidence which sustain its findings and judgment." *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 467 (Utah 1996) (internal quotation marks omitted). "If the evidence taken in the light most favorable to the verdict supports the verdict, we will affirm." *Steenblik v. Lichfield*, 906 P.2d 872, 875 (Utah 1995).

¶ 102 "To demonstrate that the evidence is insufficient to support the jury verdict, the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *Crookston I*, 817 P.2d 789, 799 (Utah 1991). Comparing the evidence State Farm marshals in its opening and reply briefs to the evidence the trial court summarizes in its order denying State Farm's motions for a judgment notwithstanding the verdict and a new trial regarding Mrs. Campbell's fraud claim, it is clear that all State Farm has

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17 (...continued)
And so what we have is a situation where the evidence shows that even before trial there was an agreement to pursue a bad-faith action by parties who can't pursue it without Campbell helping them. And I submit to you that for that agreement to be carried out, no execution could be pursued and there was no intent to ever do that.

done in this appeal is to "argue selected evidence favorable to its position." *Id.* at 800. As we held in *Crookston I*, "[t]hat does not begin to meet the marshalling burden [State Farm] must carry." *Id.* State Farm's failure to meet its marshalling burden is "grounds to reject [its] attack on the fraud finding." *Id.*

¶ 103 The entirety of State Farm's summary of the evidence is contained in one paragraph of its brief. By contrast, the jury, having listened to weeks of trial testimony, and having been properly instructed on the elements of fraud, found in favor of both plaintiffs. Furthermore, in its Order Denying State Farm's Motions for Judgment NOV and New Trial Regarding Fraud, the trial judge noted: "The evidence at trial supporting each of the elements of fraud is extensive, and it is not practical to set forth all of the evidence in this Order. However, the following summary highlights some of the evidence." There follow in the Order fourteen paragraphs (four-and-a-half pages) of factual summary detailing the fraud evidence. The summary ends with this paragraph:

> n. Most of the misrepresentations and non-disclosures were also made to Inez Campbell, with the intent that Mrs. Campbell would rely thereon, which she did. Even where misrepresentations were made only to Mr. Campbell, it was apparent that they would be passed on to and relied upon by Mrs. Campbell. The evidence also established that Mrs. Campbell was present with her husband, Curtis, when Wendell Bennett misrepresented that there was no need to hire separate counsel. Mr. Campbell testified that he would gladly have hired personal counsel if he had known of a risk of an excess judgment. There was ample evidence that the Campbells were working together in making decisions in the case, that Mrs. Campbell had strong influence on Curtis Campbell's decisions with respect to the case, and that had she appreciated that there was a substantial

> likelihood of losing the case, she would have insisted that it be settled and she would have had a terrific bearing on Curtis' demanding that the case be settled. There is ample evidence that the misrepresentations made in Mrs. Campbells' presence induced her inaction, to her detriment. Accordingly, there is ample evidence to support a claim of fraud by Mrs. Campbell.

¶ 104 We conclude that State Farm has entirely failed to meet its burden of marshalling the evidence on its challenge to the finding of fraud against Mrs. Campbell, and we sustain the jury's verdict and the trial court's denial of a judgment notwithstanding the verdict and a new trial.

¶ 105 The trial court limited the judgment on the fraud count to $911.25, which the Campbells paid in attorney fees after the original verdict and which was the total pecuniary loss suffered by plaintiffs. It relied in doing so on *Turner v. General Adjustment Bureau, Inc.*, 832 P.2d 62 (Utah Ct. App. 1992), *cert. denied*, 843 P.2d 1042 (Utah 1992), which held that a fraud claim may not support emotional distress damages because fraud is an economic and not a dignitary tort. *Id.* at 68. We disagree with the holding in Turner, as is reflected by our opinion in *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991), where we held that "all damages awarded by the jury can be sustained upon the finding of fraud." *Id.* at 798. We note that there is scholarly and caselaw support for this view that was apparently not considered when *Turner* was decided. *See Nelson v. Progressive Corp.*, 976 P.2d 859, 867-68 (Alaska 1999) (holding that emotional distress damages are permitted under fraud theory if severe damages); *Kilduff v. Adams, Inc.*, 219 Conn. 314, 593 A.2d 478, 484-85 (1991) ("[W]e concur with those jurisdictions that allow the recovery of emotional damages that are the natural and proximate result of fraud."); *Osbourne v. Capital City Mortgage Corp.*, 667

A.2d 1321, 1328 (D.C.1995) ("We hold that, upon proof of intentional misrepresentation, a plaintiff may recover 'emotional damages that are the natural and proximate result' of the defendant's conduct." (citation omitted)); Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 Vand. L.Rev. 1, 10-12, 23-32 (1989) ("[A]s a general rule, emotional distress damages should be awarded in fraud actions.").

¶ 106 We therefore overturn *Turner's* holding on the availability of general and emotional distress damages for fraud. In light of *Crookston I* and in view of the fact that we may sustain a trial court on a ground not relied on by the trial court, *see Bill Nay & Sons Excavating v. Neeley Constr. Co.*, 677 P.2d 1120 (Utah 1984) (citations omitted), we affirm not only the pecuniary damages assessed in this case, but also Mrs. Campbell's general damages, as well as the punitive damages, on the basis of the fraud verdict.

VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS

¶ 107 Once again, on this issue State Farm failed in its brief to adequately marshal the evidence, and its challenge is subject to rejection on that ground alone. Furthermore, it must be rejected on its merits.

¶ 108 To sustain a cause of action for the intentional infliction of emotional distress, a party "must show that (i) the conduct complained of was outrageous and intolerable in that it offended against the generally accepted standards of decency and morality; (ii) [the defendant] intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress; (iii) [the plaintiff] suffered severe emotional distress; and (iv) [the defendant's] conduct proximately caused [the]

emotional distress." *Retherford v. AT&T Communications of the Mountain States, Inc.*, 844 P.2d 949, 970-71 (Utah 1992).

¶ 109 First, State Farm challenges the jury's finding of intentional infliction of emotional distress claiming that the evidence was "exceedingly weak" and that the Campbells "failed to establish that they suffered *severe* emotional distress." When considering such challenges, "we view the evidence in the light most supportive of the verdict, and assume that the jury believed those aspects of the evidence which sustain its findings and judgment." *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 467 (Utah 1996) (internal quotation marks omitted). "If the evidence taken in the light most favorable to the verdict supports the verdict, we will affirm." *Steenblik v. Lichfield*, 906 P.2d 872, 875 (Utah 1995).

¶ 110 In discussing when the statute of limitations begins to run for the claim of the intentional infliction of emotional distress, this court stated:

> [T]he element of emotional distress is *specific to the plaintiff in each case*. Because the tort of intentional infliction of emotional distress requires actual emotional distress, see Restatement (Second) of Torts § 46(1) (1965), this element is to be gauged subjectively. A particularly hardy or calloused plaintiff may never accrue a cause of action for intentional infliction of emotional distress, even though he or she is subjected to outrageous conduct that no reasonable person could be expected to bear. Consequently, our task is to determine when ... [plaintiff] experienced severe emotional distress, not when an ordinarily sensitive person would have experienced such suffering.

Retherford, 844 P.2d at 975-76 (footnote omitted) (emphasis added). Thus, the Campbells must only show that they *subjectively* experienced severe emotional distress regarding the situation they found themselves in, not that an "ordinary reasonable person" would have experienced it that way. State Farm's citation to cases involving the negligent infliction of emotional distress for the proposition that objective proof is required to show that mental or physical consequences have occurred is inapposite. *See Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 70-72 (Utah 1998); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 973-75 (Utah 1993).

¶ 111 Second, State Farm argues that the general damages award for each of the Campbells was excessive. For an award of compensatory damages regarding the intentional infliction of emotional distress, the standard of review confronting State Farm is quite high. This court has stated:

> While it is true ... that soft compensatory damages, i.e., for pain and suffering, must be awarded with caution, "when the determination of the jury has been submitted to the scrutiny and judgment of the trial judge, his [or her] action thereon should be regarded as giving further solidarity to the judgment." *Elkington v. Foust*, 618 P.2d 37, 41 (Utah 1980). Or, as we said in *Geary v. Cain*, 255 P. at 423, 69 Utah at 358, "In case of doubt, the deliberate action of the trial court should prevail. Otherwise, this court will sooner or later find itself usurping the functions of both the jury and the trial court." *Id.* These statements in *Elkington* and *Geary* are consistent with our statement of the appropriate appellate standard of review today.

Crookston I, 817 P.2d at 806. Despite the court noting in *Crookston I* that the trial judge's "statements could have been more specific," it found them adequate to support its decision

to uphold the compensatory damage award, and therefore to support its denial of a new trial on the issue of compensatory damages. *Id.*

¶ 112 There is ample evidence in this record from which a jury could infer that each of the Campbells suffered severe emotional distress. These include: the financial ruin that they believed they faced after the jury in the underlying action rendered its verdict for more than five times the State Farm policy limit; being told by their lawyer that they could start dealing with their exposure by putting a "For Sale" sign on their house; State Farm's refusal to post a supersedeas bond to protect their home and other assets during the pendency of the appeal; and the numerous personal issues that made the Campbells, who had each experienced other traumatic events in their lives, particularly vulnerable to the stress created by State Farm's actions.[18]

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[18] Recently, we decided *Schuurman v. Shingleton*, 2001 UT 52, 26 P.3d 227, in which we held that "the alleged suffering that plaintiff has undergone in this case [severe pain and suffering and emotional distress] is not the type of distress that no reasonable person could be expected to endure." *Id.* at 25. We noted that plaintiff's alleged distress in that case was "indistinguishable from that commonly suffered by others when an intimate personal relationship fails." *Id.*
In this case, however, no reasonable person should be expected to endure the distress suffered by the Campbells at the hands of their insurer, in which they were led to believe they would lose their home and assets and be unable to enjoy their retirement, for which they had worked their entire lives.

¶ 113 Furthermore, with respect to the amount of the award, we note that the trial court did remit the amount of compensatory damages from $1,400,000 for Curtis Campbell and $1,200,000 for Inez Campbell to $600,000 and $400,000, respectively. It might be argued, given the subjective standard enunciated by this court, that the trial court should not have so drastically reduced the jury's initial awards. The Campbells, however, do not raise this issue on appeal. As pointed out above, the deferential nature of our review requires us to uphold a jury's verdict that has been scrutinized by a trial court unless there is a clear abuse of discretion. Our review of the trial court's post-trial ruling on this issue reveals no such abuse. Therefore, we find that the award was not excessive, and note that it provides an independent basis for sustaining all of Mrs. Campbell's damages. *See* Part V, *supra*, and *Crookston I*, 817 P.2d at 798 ("[A]ll damages awarded by the jury can be sustained upon the finding of fraud."); *see also Osbourne*, 667 A.2d at 1328 (holding that plaintiff may recover emotional damages that are natural and proximate result of defendant's intentional misrepresentation).

VII. MRS. CAMPBELL'S STANDING TO SUE FOR BAD FAITH

¶ 114 In view of our holding that the jury verdicts on fraud and intentional infliction of emotional distress should be sustained, and that they independently support all of the damages awarded in this case, *see* Parts V and VI, *supra*; *Crookston I*, 817 P.2d at 798; *Osbourne*, 667 A.2d at 1328, we need not address the question of Mrs. Campbell's right to sue State Farm for breach of the covenant of good faith and fair dealing. Notwithstanding the dissent's lengthy advisory opinion on the subject, the question of standing on these facts remains an open question in Utah, awaiting attention from this court in a future case. The dissent apparently offers its views in support

of its conclusion that the jury's verdict on damages was somehow prejudiced by having the bad faith claim intermingled with the fraud and intentional infliction of emotional distress claims. We conclude that this notion is entirely inconsistent with the record and the jury's verdict below. This jury responded to the factual conduct of State Farm, and, in our view, rightly so. Whether the basis for recovery bore the label of "bad faith," "fraud," or "intentional infliction of emotional distress," it was the same behavior by State Farm that the jury clearly intended to compensate for and to punish. We do not believe the jury was at all affected in its decision and verdict by the legal labels applied to describe the conduct. Thus, even if the dissent were correct in its view on this question, any error would have been harmless in its effect on damages.

¶ 115 In addition, we do not agree with the dissent that "the punitive damages award must fail because it was awarded jointly to Mr. and Mrs. Campbell rather than separately to each plaintiff." Punitive damages, "are, by nature, not to compensate but to punish and deter future egregious conduct." *Crookston I*, 817 P.2d 789, 807 (Utah 1991). Therefore, the award of punitive damages is determined by the defendant's conduct and need not be separated as to plaintiff. The dissent cites *Crookston I*, 817 P.2d 789 (Utah 1991) for its claim that the punitive damages award should be remanded "due to its joint nature." *Crookston I*, however, does not support this proposition. In *Crookston I*, we reviewed the issue of whether punitive damages were excessive under the circumstances of that case. *Id.* at 793-94. The joint nature of the punitive damages award was never questioned. *Id.* at 811-12.

¶ 116 Furthermore, we do not believe that State Farm was prejudiced by the jury instructions, which referred to the Campbells jointly. The only case cited by the dissent in support of this assertion is *Nielsen v. Pioneer Valley Hospital*, 830 P.2d

270 (Utah 1992). That case, however, involved only one plaintiff and says nothing about separating plaintiffs in jury instructions. Rather, the instructions in *Nielsen* were erroneous because separate instructions were contradictory with regard to two alternate legal theories presented by plaintiff. *See id.* at 274. The instructions were faulty because the two theories required conflicting standards, and the jury could have found defendant liable on either theory. *See id.* In this case, there was no danger, as the dissent claims, of misperception that Mrs. Campbell's claims were "caused by [ ] State Farm's actions toward Mr. Campbell." As stated previously, the jury clearly awarded punitive damages based on State Farm's egregious conduct toward both Mr. and Mrs. Campbell. Just as we do not believe the jury's decision and verdict were affected by the legal labels applied to State Farm's conduct, neither do we believe that referring to the Campbells in the aggregate in the jury instructions had any effect on the damages awarded.

¶ 117 Finally, we note that the dissent has developed and espoused a theory requiring reversal in this case that was not raised below, briefed by the parties, or raised in oral argument before this court. That theory appears to rely on what the dissent terms a "faulty verdict" in phase I of the trial below, a verdict in favor of both plaintiffs. That verdict was not challenged at the time of its entry nor was it raised in this appeal. Our review of the record and of the briefs in this appeal demonstrate that the wording of the verdict was never mentioned or relied on as a ground for claimed error. It is a well established rule that we will not reverse a trial court on the basis of claims and arguments not raised below, let alone those not even argued on appeal.[19]

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19 It is of course true, as the dissent notes, that State Farm (continued...)

VIII. ATTORNEY FEES

¶ 118 In its challenge to the trial court's award of attorney fees, State Farm raises two arguments. First, State Farm argues that fee shifting is not available under Utah law in third-party bad faith cases. Second, State Farm argues that even if some award of attorney fees is permissible in third-party cases, the amount awarded by the trial court is grossly inappropriate. We address each argument separately below.

A. Fee Shifting in Third-Party Cases

¶ 119 Whether attorney fees should be awarded in a particular case is a question of law reviewed for correctness. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998). "The general rule in Utah, and ... the traditional American rule, subject to certain exceptions, is that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 782 (Utah 1994). Because the Campbells do not argue here, nor did they below, that a statute or contract authorizes them to recover attorney fees, we turn our analysis to the "certain exceptions" to the general rule.

¶ 120 Under Utah law, plaintiffs may recover attorney fees if they are successful in pursing a first-party bad faith suit

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19 (...continued)
argued the issue of Mrs. Campbell's standing to sue for bad faith in Point IV. A of its appellate brief. It did not, however, challenge the phase I verdict in favor of Mrs. Campbell on the fraud and intentional infliction of emotional distress claims on the same basis, since those claims were based in tort, not contract.

against their insurer. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 468 (Utah 1996). Such actions fall within the rule that the damages available to plaintiffs "include both general damages, *i.e.*, those flowing naturally from the breach, and consequential damages, *i.e.*, those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985). The rationale behind allowing recovery of both general and consequential damages in first-party, bad faith actions is "to remove any incentive for insurers to breach the duty of good faith by expanding their exposure to damages caused by such a breach beyond the predictable fixed dollar amount of coverage provided by the policy." *Billings*, 918 P.2d at 466. Consequential damages in first-party bad faith actions can be awarded for such things as attorney fees, loss of a home or business, damages flowing from bankruptcy, and mental anguish, provided such damages are foreseeable. *Id.* at 468; *Beck*, 701 P.2d at 802.

¶ 121 Extending the rationale advanced in the first-party bad faith cases to the third-party bad faith case before it, the trial court concluded that attorney fees should likewise be recoverable. The trial court offered the following in support of its conclusion:

> a. An award of attorney's fees ... removes some of the incentive for an insurer to breach the duty of good faith and fair dealing.
> b. Such an award encourages insurers to act reasonably.
> c. The award of "actual" attorney's fees is designed to assist in fully compensating the insured for the damages caused by the breach of good faith duties, whether such good faith duties arise from a first-party or a third-party situation.

> d. For purposes of this issue, there is no reasonable basis to distinguish an insured's damages incurred in a first-party or third-party context[.]
> e. The duties of good faith arising in a third-party context include fiduciary duties and are higher duties than the duties arising under the contract theory in a first-party context.

(Citations omitted.) Because we agree with the trial court's analysis, we affirm its conclusion that plaintiffs can recover foreseeable attorney fees if they successfully pursue a third-party bad faith action against their insurer. Although the foreseeability of damages test is generally limited to the contractual realm, we note that its use to determine damages in the context of tortious third-party, bad faith claims is justified since such "claims arise only because of the contractual relationship of the parties." *Savage v. Educators Ins. Co.*, 908 P.2d 862, 866 (Utah 1995) (holding that employee who had no contractual relationship with employer's workers' compensation insurance carrier could not sue carrier for breach of the covenant of good faith and fair dealing since such actions are predicated upon parties' contractual relationship).[20]

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[20] In *Gibbs M. Smith, Inc. v. United States Fidelity & Guaranty Co.*, 949 P.2d 337, 344 (Utah 1997), this court implied the same result we reach here, by holding, in a third-party claim, that attorney fees were recoverable for a breach of the implied covenant of good faith and fair dealing. Although the court observed that "a more accurate statement might be that this is a first-party action for third-party coverage," it is plain on the facts that the action involved what we described in *Beck* as a third-party claim. Thus our holding in that

(continued...)

¶ 122 Finally, we note that the existence of a fiduciary relationship between insurers and insureds in the context of third-party bad faith claims, which we recognized in *Beck*, supports an exception to the general rule that attorney fees are not recoverable in tort actions. State Farm relies on a 1996 Colorado case, *Bernhard v. Farmers Insurance Exchange*, 915 P.2d 1285 (Colo.1996), holding that such fees are not recoverable. However, *Bernhard* clearly recognized that "[a]ttorney fees may be recoverable in an action for breach of fiduciary duty as a recognized exception to the American rule." *Id.*, at 1289 (citations omitted). The Colorado Supreme Court, however, concluded that insurers were only "quasi," and not "true," fiduciaries, and thus declined to apply the exception. We disagree with *Bernhard's* view of the relationship, which is contrary to the Utah position. We do, however, accept its assertion that breach of a fiduciary obligation is a well-established exception to the American rule precluding attorney fees in tort cases generally. We thus conclude that the trial court correctly held attorney fees to be a proper element of damages in this case.

¶ 123 Thus, the issue becomes whether, at the time State Farm issued the policy to the Campbells, State Farm could reasonably foresee that if a claim arose against it the Campbells would incur attorney fees in pursuing that claim. Review of the transcript discloses that, at a minimum, State Farm's Claims Vice-President, Frank Haynes, knew that insureds pursuing claims against State Farm typically retained attorneys on a

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20 (...continued)
case, despite its scant analysis, stands for the proposition that fees are awardable in third-party bad faith claims by an insured against its insurer, a ruling we make explicit today.

contingency fee basis. Based on this, we hold that an award of attorney fees to the Campbells was indeed foreseeable by State Farm.

B. Amount of Attorney Fees Award to the Campbells

¶ 124 State Farm argues that the trial court erred in awarding the Campbells attorney fees equal to 40% of the compensatory damages award. Instead, State Farm suggests that the attorney fees awarded, if any, should be limited to $911.25, the amount the Campbells paid to its attorneys to obtain the benefits due them under the policy. Resolution of this issue requires application of the foreseeability test discussed in the previous section. In other words, could State Farm reasonably foresee that the Campbells would agree to a contingency attorney fee of 40% of the amount recovered for compensatory damages if they found it necessary to hire counsel to pursue a claim against State Farm?

¶ 125 At the hearing on the Campbells' motion for a directed verdict, the trial court concluded that such a fee agreement was foreseeable to State Farm. A trial court's conclusion as to what constitutes a reasonable attorney fee award is reviewed for an abuse of discretion. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998). The record contains ample support for the trial court's conclusion. Perhaps most telling was State Farm's failure to present any evidence that it could not have foreseen that the Campbells would incur a contingency fee, combined with specific evidence from Vice President Haynes that contingency fees of up to 50% were common in suits by insureds against State Farm. Moreover, the Campbells presented evidence through several witnesses that contingency fees like this one have been around for decades, are well-known, and are in fact the most likely form of attorney fee arrangement, especially in a bad faith case against an

insurance company. Such evidence is similar to that presented in *Billings*, where we found that the plaintiff's contingency fee arrangement was foreseeable. *Billings*, 918 P.2d at 468. Therefore, we affirm the trial court's finding that the contingency fee agreement was foreseeable and uphold its award of attorney fees in the amount of 40% of the total compensatory damages, or $400,834.70 plus 40% of post- judgment interest on the principal amount of compensatory damages.[21]

IX. LITIGATION EXPENSES

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21 We explicitly reject State Farm's proposal to limit the award of attorney fees to $911.25, the amount the Campbells paid to obtain the benefits of their insurance contract with State Farm. Because the very purpose of a bad faith claim is to recover extra-contractual damages-- namely, the amount of the excess judgment and any compensatory damages suffered in connection with the insurer's bad faith--it would be entirely incongruent to limit attorney fee awards to those fees incurred to secure the benefits of the insurance contract.
We also reject State Farm's argument that Mr. Campbell's award of attorney fees should be limited to 4% of the total amount of compensatory damages awarded. Examination of the agreement between Mr. Campbell, Slusher, and Ospital reveals that Mr. Campbell is fully liable for all attorney fees unless there is no recovery or a recovery that is insufficient to cover the attorney fees and litigation expenses. Because the recovery here is sufficient, Mr. Campbell is obligated to pay the full contingency fee in the amount of 40% of the compensatory damages awarded.

¶ 126 Finally, State Farm argues that the trial court's award of litigation expenses was manifestly unreasonable. According to its statement of the issue, State Farm challenges the legitimacy of any award for litigation expenses, as well as the actual amount awarded by the trial court.[22]

¶ 127 As to the legitimacy of an award of litigation expenses in a case, like this, where an insurer has breached its good-faith duties to pay third-party claims, we are asked to settle a question of law, and therefore review the trial courts' ruling for correctness. State Farm relies on the distinction this court made in *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985) between first-party insurance claims, sounding in contract, and third-party claims, on which a tort action may be brought. It then argues that, like attorney fees, litigation expenses may not be awarded as damages in a tort action. For the same reasons detailed in the previous section regarding attorney fees, we conclude that litigation expenses are recoverable in this limited type of action; their availability will: (1)

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22 With respect to State Farm's argument concerning the legitimacy of awarding any expenses, State Farm has failed to meet the requirements of Utah Rule of Appellate Procedure 24. In particular, State Farm has failed to satisfy subsection (a)(5) of rule 24 which requires it to include in its brief "[a] statement of the issues presented for review, including for each issue: *the standard for appellate review with supporting authority*." (Emphasis added.) Although State Farm's issue statement addresses both attorney fees and litigation expenses, State Farm only cites a case discussing the standard of review for attorney fee awards, not awards for litigation expenses, and makes no attempt to analogize awards of litigation expenses to awards for attorney fees.

decrease incentives for insurers to act in bad faith; (2) encourage insurers to act reasonably; and (3) contribute to actual compensation for plaintiffs for financial cost to them of the breach. The trial court specifically found that "litigation expenses incurred by plaintiffs [were] ... foreseeable to State Farm, particularly in light of State Farm's labored, vexatious and burdensome defense...."; "State Farm knew or should have known that its oppressive defense raised against plaintiffs' claims would be extremely costly to plaintiffs...." These observations underscore the policy reasons supporting our determination that litigation expenses may be awarded in bad faith insurance cases in which the defendant's litigation conduct has been largely responsible for them.

¶ 128 Because a challenge to the amount of litigation expenses awarded is similar to a challenge to the amount of attorney fees awarded or the amount of costs awarded under Utah Rule of Civil Procedure 54(d), we review such awards under an abuse of discretion standard. *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 460 (Utah 1993) ("The determination to award taxable costs is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion."); *City Consumer Servs., Inc. v. Peters*, 815 P.2d 234, 240 (Utah 1991) ("The standard of review on appeal of a trial court's award of attorney fees is patent error or clear abuse of discretion." (internal quotation marks omitted)). Moreover, we note that the appropriate measure for awarding litigation expenses is whether such expenses are reasonable and necessary.

¶ 129 In determining that the litigation expenses awarded to Campbells were reasonable and necessary, the trial court made the following written findings:

a. The extensive evidence, from which the litigation expenses arose, was necessary to prove each of plaintiffs' causes of action (i.e. breach of good faith duties, intentional infliction of emotional distress and fraud) as well as to refute State Farm's defenses to these causes of action.
b. In cases of corporate fraud, intentional infliction of emotional distress and breach of good faith duties, there needs to be considerable latitude in presenting evidence to prove intent, reckless disregard, absence of mistake or innocent mistake, a plan or scheme, and outrageous conduct, and to address other elements of these causes of action and the defenses thereto such as those raised by State Farm in this case.
c. State Farm had a policy and practice to destroy historical documents ... and therefore could not produce very substantial relevant documentation during the time period in question. Of plaintiffs' litigation expenses, much was incurred due to this policy and practice of State Farm.
d. At State Farm's request, the case was bifurcated, even though plaintiffs resisted upon the grounds that it would increase the expenses.
e. There were collateral issues of agency, notice, knowledge and general corporate practices that had to be proven by extensive circumstantial evidence, resulting in the large litigation expenses.
f. Compensatory damages, particularly soft damages, are best evaluated and assessed in the context of the totality of all of the circumstances surrounding the wrongful conduct.
g. Though there may have been some overlap in the evidence that was necessary to establish plaintiffs' causes of action for compensatory damages and punitive damages, and the other collateral issues in the case, the Court finds that all of the costs were reasonably and necessarily incurred and are justified for reasons other than those exclusively related to punitive damages.

h. In numerous evidentiary hearings and orders relating thereto, this Court has set forth in more detail the reasons why the extensive evidence was probative, reasonable and necessary to the plaintiffs' case, and the Court adopts its findings and conclusions set forth in [such orders].

¶ 130 From these findings, it is clear that the trial court carefully considered whether the costs requested by the Campbells were reasonably and necessarily incurred during their pursuit of this case. In addition, State Farm failed to present any affidavits or contradictory evidence refuting the evidence offered by Campbells. Finally, the trial court himself was present throughout this lengthy and complex trial, and was in a good position to gage the accuracy of plaintiffs' evidence. We therefore hold that the trial court did not abuse its discretion in accepting the amounts proffered by the Campbells and awarding those amounts as litigation expenses.

CONCLUSION

¶ 131 In summary, we hold:

1. The trial court's analyses of the punitive damage award under both federal law and the first six *Crookston I* factors was correct. As to *Crookston I* factor seven, we reverse, and reinstate the jury's award of $145 million on the Campbells' cross-appeal.
2. The trial court did not abuse its discretion in admitting "other acts" evidence relating to State Farm's claims handling practices.
3. The trial court did not abuse its discretion in admitting the testimony of the Campbells' expert witnesses.
4. The trial court did not abuse its discretion in precluding admission of the Slusher/Ospital settlement agreement.

5. The evidence is sufficient to support the jury's finding of fraud by State Farm against Mrs. Campbell.
6. General Compensatory and punitive damages may be awarded for fraud.
7. The evidence is sufficient to support the jury's finding of intentional infliction of emotional distress against both Mr. and Mrs. Campbell.
8. The remitted compensatory damage awards granted to Mr. and Mrs. Campbell are not excessive.
9. The trial court's award of attorney fees and litigation expenses are correct.

Therefore, we affirm the judgment against State Farm in all respects, except for the trial court's remittitur of the punitive damage award. On this issue, we reverse the trial court and reinstate the jury verdict awarding $145 million in punitive damages.

¶ 132 Justice WILKINS, Judge BILLINGS, and Judge DAVIS concur in Justice DURHAM's opinion.

¶ 133 Having recused themselves, Chief Justice HOWE and Justice DURRANT do not participate herein. Judge JUDITH M. BILLINGS and Judge JAMES Z. DAVIS from the Court of Appeals sat.

RUSSON, Associate Chief Justice, concurring in part and dissenting in part:

¶ 134 Inez Campbell was never involved in the lawsuit underlying the action now before us, nor could she have been. She was not driving the car that caused the accident, she was never named as a defendant, and she never had any exposure to or became legally obligated to pay damages to any of the claimants. State Farm owed no duty to her under the insurance

policy. Only her husband Curtis Campbell was potentially liable, was sued, and was subject to the judgment rendered in that case. State Farm's duty extended only to him.

¶ 135 Ignoring these crucial facts, the trial court in the second stage of the bifurcated trial in this case erroneously instructed the jury three times that State Farm had already been found liable to both Mr. and Mrs. Campbell for breaching its fiduciary duty and its duty of good faith and fair dealing. In fact, the jury in the prior stage of the trial never rendered a verdict extending liability for bad faith to Inez Campbell. As a result, the trial court's multiple jury instructions to the contrary misled the jury and, in the process, vitiated State Farm's right to a fair trial. This error was plain, and it tainted every aspect of the verdict now under review,[1] including Mrs. Campbell's independent claims for fraud and intentional infliction of emotional distress. The majority's attempt to nevertheless affirm on so-called "independent" grounds glosses over the fatal flaws explicit in the lower court's judgment and runs contrary to this court's own well-established case law.

I. INEZ CAMPBELL'S BAD FAITH CLAIM

¶ 136 Although the majority declines to address the issue, it is clear under Utah law that Inez Campbell never had standing to sue State Farm for bad faith. While this court has long recognized tort claims for an insurance company's breach of its implied covenant of good faith and fair dealing, *see Ammerman v. Farmers Ins. Exch.*, 19 Utah 2d 261, 266, 430 P.2d 576, 577-78 (1967), we have always required that plaintiffs wishing to bring such claims first demonstrate a contrac-

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1 State Farm raises the issue of Mrs. Campbell's standing to sue for bad faith in point IV.A of its appellate brief.

tual nexus through which their suits arise. As we unanimously held only two years ago in *Sperry v. Sperry*, "Utah law clearly limits the duty of good faith to first parties to insurance contracts. Consequently, only a first party can sue for breach of that duty." 1999 UT 101, ¶ 7, 990 P.2d 381. This conclusion is as natural as it is logical, for "both first- and third-party claims arise only because of the contractual relationship of the parties." *Savage v. Educators Ins. Co.*, 908 P.2d 862, 866 (Utah 1995).

¶ 137 In this case, Curtis Campbell was a party to the insurance contract with State Farm, and his wife Inez Campbell was not. The contract itself states:

> STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ... Agrees with the *insured, named in the declarations made a part hereof*, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all the terms of this policy.... (Emphasis added.) The only person listed as a "named insured" on the declarations to which the contract refers is Curtis Campbell. In fact, Mr. Campbell is the only person listed on those declarations at all. Consequently, Mr. Campbell was the only one with whom State Farm "[a]gree[d] ... in consideration of the payment of the premium" to provide insurance for those designated as covered by the policy. Mrs. Campbell was simply a beneficiary of the contract, an additional insured.

¶ 138 Importantly, we have explicitly held that the implied covenant of good faith and fair dealing does not extend to parties who are merely beneficiaries of an insurance policy. In *Savage v. Educators Insurance Co.*, 908 P.2d 862 (Utah 1995), a school bus driver who was insured under an Educators policy purchased by her employer sued the insurance company

for allegedly acting in bad faith by resisting to compensate her for medical expenses she had incurred. Recognizing that "the duty of good faith and fair dealing is a contractual covenant, one that arises solely as an incident to contractual obligations owed by an insurer to its insured," Chief Justice Zimmerman's 4-1 opinion, from which Justice Durham dissented, flatly rejected the plaintiff's contention that she had standing to sue. *Id.* at 866. We held:

> Because Savage has no contractual relationship with Educators, she has no cause of action against it for breach of the covenant of good faith and fair dealing. This conclusion is consistent with the commentators and the great majority of courts in other jurisdictions....

Id.[2] Nothing is different here. Just as the Jordan School

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[2] Indeed, the overwhelming majority of jurisdictions follow exactly the same rule Utah does: that "the duty of good faith and fair dealing derives from and exists solely because of the contractual relationship of the parties." *Austero v. Nat'l Cas. Co.*, 62 Cal.App.3d 511, 133 Cal.Rptr. 107, 110 (1976); *see, e.g., Lowe v. Am. Med. Int'l*, 494 So.2d 413, 414 (Ala.1986) ("The cause of action for the tort of bad faith refusal to pay was created to protect only the person for whose benefit the insurance payments should have been made."); *Hatchwell v. Blue Shield of California*, 198 Cal.App.3d 1027, 244 Cal.Rptr. 249, 253 (1988) ("Although [Mrs. Hatchwell] was eligible for health care benefits as a Dependent Subscriber [on Mr. Hatchwell's insurance policy], and as such may be termed a 'co-insured' or 'dependent beneficiary,' as she urges, this is not sufficient to establish standing to sue for breach of contract and bad faith based upon the denial of benefits to [Mr. Hatchwell]." (citations omitted)); *Soto v. Royal Globe Ins. Co.*, 184 Cal.App.3d 420, 229 Cal.Rptr. 192, 197 (1986) ("One who is not a party to the insurance contract and the accompanying implied covenant of good faith and fair dealing may not maintain an action for breach of the covenant."); *Eastham v. Nationwide Mut. Ins. Co.*, 66 Ohio App.3d 843, 586 N.E.2d 1131, 1133 (1990) (holding that a wife did not have standing to bring a bad faith claim against her automobile liability insurer for failing to timely pay the medical expenses of her deceased son, even though she was insured under the policy); *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d 193, 197-98

(continued...)

District contracted with Educators for a policy that insured Pat Savage, in this case Mr. Campbell purchased his insurance policy from State Farm, a policy that also insured Mrs. Campbell. Consequently, the contract states by its own terms that it is an agreement between State Farm and Curtis Campbell--and no one else. Had Mrs. Campbell wished to be named as a party to the contract rather than merely as a beneficiary of it, she could have negotiated for that right. Because she did not do so, however, she had no right under Utah law to sue for bad faith. *See Savage*, 908 P.2d at 866.

¶ 139 To this degree, Justice Durham's assertion that any conclusion reached concerning whether Inez Campbell had standing to sue for bad faith is an "advisory" one constitutes nothing less than hyperbolic pretense. The claim for bad faith was the crux of the case against State Farm, and it was for this reason that the lower court bifurcated the trial in the first place.

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2 (...continued)
(1989) ("[A] wife's coverage as a dependent under her husband's health insurance policy does not give her standing to enforce her husband's contract rights for bad faith denial of health care benefits."); *Vecchiarelli v. Cont'l Ins. Co.*, 216 A.D.2d 909, 628 N.Y.S.2d 892, 893 (1995) (upholding the dismissal of a spouse's claim for bad faith where no contractual nexus was present); *see also Correa v. Pa. Mfrs. Ass'n Ins. Co.*, 618 F.Supp. 915, 929 (D.Del.1985) (finding that the duty of good faith and fair dealing does not extend to the spouse of someone insured under a workers' compensation policy); *Transp. Ins. Co. v. Archer*, 832 S.W.2d 403, 405 (Tex.Ct. App. 1992) (disallowing a spouse's suit for bad faith when her husband was denied benefit payments from his workers' compensation carrier).

Moreover, our decision in *Savage* addressed precisely the issue in question here. Accordingly, any notion that the question of whether Mrs. Campbell had standing to sue for bad faith is "an open [one] in Utah" can be characterized only as a conclusion that recklessly throws all judicial restraint, particularly in the name of stare decisis, to the wind for the sake of achieving a desired result: a binding judgment against State Farm for its, admittedly, condemnable behavior.

¶ 140 Importantly, however, the law has long recognized that not all actions causing injury enjoy recourse in the courts. *E.g.*, *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 140, 974 P.2d 1194 (Zimmerman, J., concurring) ("The law simply does not recognize that every harm suffered should be compensated."); *Demman v. Star Broadcasting Co.*, 28 Utah 2d 50, 53, 497 P.2d 1378, 1380 (1972) (finding that lawsuits cannot be allowed "in every instance"); *see also Black's Law Dictionary* 398 (7th ed. 1999) (" 'There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it.' " (quoting John Salmond, *Jurisprudence* 372-73 (Glanville L. Williams ed., 10th ed.1947))). This rule of *damnum absque injuria* applies regardless of how offensive or inappropriate society might find an actor's conduct to be, and this court has itself repeatedly barred recovery for conduct that could very well be considered condemnable but for which there is no cause of action. *See, e.g.*, *Sears v. Ogden City*, 572 P.2d 1359, 1362 (Utah 1977) (holding that there is no recovery for government action making access to one's property difficult and inconvenient); *Demman*, 28 Utah 2d at 53, 497 P.2d at 1380 (denying recovery for slander to a losing political candidate after a radio station broadcasted "obnoxious" remarks by a caller who asserted that the candidate was unqualified and a felon); *N.M. Long & Co. v. Cannon-Papanikolas Constr. Co.*, 9 Utah 2d 307, 310, 343 P.2d 1100, 1102 (1959) (affirming judgment for

no recovery from defendants who had made unusable plaintiff's fish pond business by draining water from their property); *Twenty-Second Corp. of the Church of Jesus Christ of Latter-Day Saints v. Oregon Short Line R.R. Co.*, 36 Utah 238, 255-56, 103 P. 243, 249-50 (1909) (disallowing recovery for disruption of worship services caused by operation of a railroad near a church on Sundays). Consequently, regardless of Justice Durham's assertion to the contrary, it absolutely does matter what legal theory plaintiffs hang their damages on, because failure to sufficiently prove all elements of a given cause of action makes the difference between an injury for which the law provides recourse and one for which there is no legal remedy at all. As such, the majority opinion's curious admission that the jury was not "at all affected in its decision and verdict by the legal labels applied to describe [State Farm's] conduct" in this case both undermines the logic of the opinion itself and emphasizes the importance of whether Mrs. Campbell had standing to sue for bad faith. For if, as the majority recognizes, the jury disregarded the appropriate legal standard in an attempt to "punish" State Farm for conduct the jury found offensive, that is unrefuted evidence of error in law, passion, and prejudice on the jury's part--necessitating a new trial on the court's own motion. *See, e.g., Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1084 (Utah 1985); *Paul v. Kirkendall*, 1 Utah 2d 1, 3, 261 P.2d 670, 671 (1953); Utah R. Civ. P. 59. Moreover, the majority's recognition that the jury disregarded the applicable legal standards in this case actually helps explain the great extent to which the trial court's erroneous instruction that State Farm had committed bad faith against Mrs. Campbell confused and inflamed the jury. *See infra* part III.A.

¶ 141 Indeed, the majority's reluctance to recognize that Mrs. Campbell never had standing to sue for bad faith only highlights the problems created at the trial level when the lower

court inappropriately allowed Mrs. Campbell standing. In fact, the trial court's failure to recognize that Mrs. Campbell did not have standing to pursue a bad faith claim for State Farm's failure to settle the lawsuit against Mr. Campbell eventually led to the court's rendering a faulty verdict in the first stage of the case, and then erroneously instructing the jury in the second stage that State Farm had already been found liable to Mrs. Campbell for bad faith when no such verdict had ever been rendered.

II. THE TRIAL COURT'S FAULTY VERDICT AND ERRONEOUS INSTRUCTION

¶ 142 This case was bifurcated, resulting in two different jury trials with verdicts. The jury in the first stage of the bifurcated trial was asked by the special verdict form only whether there was a likelihood of a judgment being entered in favor of various claimants against Curtis Campbell, and whether State Farm had "act[ed] unreasonably when it chose not to settle [the various claims] against *Curtis B. Campbell* for *Mr. Campbell's* policy limit." (Emphasis added.) Never was the jury in this first stage of the bifurcated trial asked to answer any question that pertained to Inez Campbell, and the jury accordingly never entered any such verdict in her favor.[3]

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[3] As explained above, there was good reason the jury in the first stage of the bifurcated trial was never asked questions as to breach of duty to Inez Campbell. State Farm did not owe a duty to Inez Campbell to settle the case in her behalf. Inez Campbell was not the driver of the vehicle involved in the accident and had no exposure of liability for claims arising from the accident. For the same reason, she was not named as a defendant

(continued...)

¶ 143 However, after reciting the jury's special verdict that addressed only State Farm's actions with respect to Curtis Campbell, the judgment entered in the first stage of the bifurcated trial stated, "Based on the above findings by the jury, ... *plaintiffs* are granted judgment of liability against defendant State Farm ... based on State Farm's breach of its duty to act in good faith in defending Curtis Campbell." (Emphasis added.) Therefore, with no further explanation, the court ordered that State Farm was liable to both Curtis and Inez Campbell solely on the basis of the jury's findings that State Farm had breached its duty to Curtis Campbell. This giant leap of faith and logic assumed that liability can arise out of the ether for one plaintiff if a jury finds it for another, a result wholly at odds with Utah procedure and law. *See, e.g., Brigham v. Moon Lake Elec. Ass'n*, 24 Utah 2d 292, 298, 470 P.2d 393, 397 (1970) (when special verdict submitted, jury finds facts and court applies law); *Colovos v. Home Life Ins. Co. of New York*, 83 Utah 401, 414, 28 P.2d 607, 612 (1934) (court enters judgment on the verdict); Utah R. Civ. P. 47(q) (jury declares verdict). To be sure, this failure to conform to the verdict was plain error, rendering the judgment void on its face and requiring our reversal of Mrs. Campbell's bad faith claim on appeal--especially given the unavoidable conclusion that Mrs. Campbell never had standing to sue for bad faith in the first place.

¶ 144 Moreover, the trial court's faulty judgment eventually resulted in severely misleading the jury in the second stage of the bifurcated trial. Indeed, in the second stage of the case, the trial court erroneously instructed the jury three times that the previous jury had found State Farm liable to Inez Campbell

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[3] (...continued)
in the underlying case in Cache County.

for bad faith even though no such determination had ever been made. State Farm objected to this instruction, but the court gave the erroneous instruction nevertheless. For instance, jury instruction 25 stated:

> You are instructed that a previous jury in this case has found ... that State Farm acted unreasonably in not settling [the] claims against *Mr. Campbell* before the Cache County verdicts. This means that State Farm breached its duties of good faith and fair dealing and its fiduciary duty to *Campbells* to settle the claims against Curtis Campbell within the policy limits.

(Emphasis added.) Likewise, jury instruction 28 informed the jury that "State Farm breached its fiduciary duties and duties of good faith and fair dealing to *the Campbells*," and thus, that the jury could award "compensatory damages ... caused by State Farm's breaches of these duties." (Emphasis added.) Even the special verdict questions put to the jury were prefaced with the statement that

> [i]t has previously been determined that State Farm breached its duty of good faith and fair dealing towards *the Campbells*.

(Emphasis added.) As noted, however, this statement simply was not true. The jury in the first stage of the trial never found liability toward Inez Campbell. The trial court's multiple instructions to the contrary in the second stage of the trial were misleading to the jury and constituted plain and prejudicial error, for the jury's erroneous assumption that State Farm was liable to Inez Campbell for bad faith permeated every aspect of the verdict rendered in the second stage of the trial.

III. THE PREJUDICIAL EFFECTS OF THE

TRIAL COURT'S ERROR

¶ 145 Because the trial court erroneously instructed the jury in the second stage of the bifurcated trial that State Farm had been found liable to Mrs. Campbell for bad faith, the judgment from the trial's second stage must be vacated and remanded as to Inez Campbell's claims for fraud and intentional infliction of emotional distress, and as to the punitive damages award rendered jointly to Mr. and Mrs. Campbell. Those instructions tainted the jury's consideration of Mrs. Campbell's claims for fraud and intentional infliction of emotional distress, thus preventing any chance that State Farm would receive a fair trial on those issues or on the issue of punitive damages. Moreover, the erroneous instructions fundamentally altered the jury's consideration of punitive damages in contravention to our decision in *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991). Indeed, both independently and together, the trial court's severe missteps in this regard constituted plain error necessitating reversal on appeal--especially given that such errors occurred, not because the trial court mistakenly overlooked a matter of procedure or law, but as a result of the court's own affirmative actions in respect to the verdict in the first stage of the case and the jury instructions and special verdict form in the second.[4]

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[4] Justice Durham, in a single paragraph, apparently takes exception to the entire dissent on the ground that the parties failed to raise the "wording" of the trial court's faulty verdict from the first stage of the case below or on appeal. Despite this bald assertion, State Farm did specifically challenge on appeal the trial court's determination that Mrs. Campbell had standing to sue for bad faith. In fact, State Farm argued that "[t]he court (continued...)

A. Right to a Fair Trial

¶ 146 All parties to litigation--plaintiff and defendant alike--are entitled to a fair trial. In Utah, this right to a fair trial has long included the right to "a presentation of the case to the jury under instructions that clearly, concisely and accurately state the issues and the law applicable thereto so that the jury will understand its duties." *Hanks v. Christensen*, 11 Utah 2d 8, 12, 354 P.2d 564, 566 (1960); *see also, e.g., Rowley v. Graven Bros. & Co.*, 26 Utah 2d 448, 451, 491 P.2d 1209, 1211 (1971); *Brunson v. Strong*, 17 Utah 2d 364, 368, 412 P.2d 451, 454 (1966); *Williams v. Lloyd*, 16 Utah 2d 427, 429, 403 P.2d 166, 167 (1965); *Wellman v. Noble*, 12 Utah 2d 350, 352, 366 P.2d 701, 702 (1961); *Utah State Nat'l Bank v. Livingston*, 74 Utah 456, 458-59, 280 P. 327, 327-28 (1929). In this case,

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[4] (...continued)
below" should not have "concluded that Mrs. Campbell had standing" based "solely on her marital relationship to Curtis Campbell." Moreover, this court has repeatedly held that we "may consider issues raised for the first time on appeal if the trial court committed plain error." *Julian v. State*, 966 P.2d 249, 258 (Utah 1998); *see also, e.g., Green v. Louder*, 2001 UT 62, ¶ 34, 29 P.3d 638 (Durham, J.); *State v. Helmick*, 2000 UT 70, 8, 9 P.3d 164 (Durham, J.); *Berenda v. Langford*, 914 P.2d 45, 51 n. 1 (Utah 1996); *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994); *State v. Germonto*, 868 P.2d 50, 58 (Utah 1993) (Durham, J.); *State v. Brown*, 853 P.2d 851, 853-54 (Utah 1992) (Durham, J.). The trial court's actions in this case unequivocally constituted plain error, a point made repeatedly throughout the dissent. *See supra* ¶¶ 135, 140, 143, 144, 145, 149; *infra* ¶ 155.

however, the instructions given by the court to the jury were anything but "clear" or "accurate," and State Farm consequently never received a fair trial.

¶ 147 In fact, the instructions' multiple erroneous statements that State Farm had been found liable to Inez Campbell for bad faith possessed only the possibility to confuse the jury and the issues it was to decide. Perhaps most problematically, the court's erroneous statements "took the jury's mind from the real issue" of whether State Farm was liable under Mrs. Campbell's claims for fraud and intentional infliction of emotional distress by "emphasiz[ing][a] situation[ ] ... not supported" by the facts or law--that State Farm was already liable to Inez Campbell for bad faith. *Taylor v. Johnson*, 15 Utah 2d 342, 349-50, 393 P.2d 382, 387-88 (1964). We have previously held that such an effect violates a party's right to a fair trial, and nothing militates to the contrary here. *See id.* Likewise, the court's instructions created the misperception that Mrs. Campbell's claims were inextricably bound up in, and caused by, State Farm's actions toward Mr. Campbell. In so doing, the court impermissibly confused the jury by repeatedly referring to "the Campbells" in the aggregate, rather than by separating the two plaintiffs and their respective claims as required by law. *Cf. Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270, 274 (Utah 1992) (holding that plaintiff had been denied her right to a fair trial when the court gave instructions confusing the two legal theories on which she was pursuing her claim); *King v. Barron*, 770 P.2d 975, 977 (Utah 1988) (finding severance appropriate where merging trial for plaintiff's legally unrelated claims "would invite error and confusion" by forcing jury to consider different evidence and theories in relation to separate defendants). Had the court specifically instructed the jury that Inez Campbell's claims for fraud and intentional infliction of emotional distress were entirely separate from those lodged by Curtis Campbell--or had it severed Mrs.

Campbell's suit from Mr. Campbell's upon making the correct and appropriate determination that she had no standing to sue for bad faith--then the prejudicial effects of this statement arguably would have been avoided. But the court did not take such an action, and as a consequence both the entire verdict as to Mrs. Campbell and the punitive award, which was rendered jointly as to Mr. and Mrs. Campbell, were irreparably tainted by the court's denying State Farm its right to a fair trial.

¶ 148 Indeed, the lower court's violation of State Farm's right to a fair trial in this case is especially flagrant in view of the great care with which trial courts are required to select juries. The process of voir dire exists so that courts can ensure "a fair and impartial jury [is] chosen." 47 Am.Jur.2d, *Jury* § 189, at 871 (1995). Likewise, partiality, prejudice, and bias all constitute reasons upon which a trial court may excuse a juror for cause, Utah R. Civ. P. 47(f)(6), and we have specifically held that trial "judges should err on the side of caution in ruling on for-cause challenges," as courts' discretion in this area is limited due to the "ease with which all issues of bias can be dispensed by the simple expedient of replacing a questionable juror with another whose neutrality is not open to question." *State v. Saunders*, 1999 UT 59, ¶ 51, 992 P.2d 951. As a result, we have further held that where a jury considers in its deliberations evidence not introduced at trial, a new trial is required to ensure fairness and impartiality of the ultimate result. *See State ex rel. Road Comm'n v. White*, 22 Utah 2d 102, 103, 449 P.2d 114, 115 (1969).[5] Similarly, courts uniformly require dismissal

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[5] *Accord United States v. Castello*, 526 F.Supp. 847, 848-50 (W.D.Tex.1981) (granting a new trial where a juror conducted ballistic experiments and reported the results to the jury); *Frede v. Downs*, 101 Ill.App.3d

(continued...)

of potential jurors who have prior knowledge of facts material to the dispute, and require a new trial where such jurors were not dismissed. *See, e.g., Lewis v. State ex rel. Baxley*, 260 Ala. 368, 70 So.2d 790, 791-92 (1954) (affirming trial court's decision to dismiss six jurors from a disciplinary proceeding because their animals had been treated by the veterinarian under review); *Barker v. Commonwealth*, 230 Va. 370, 337 S.E.2d 729, 733 (1985) (reversing a conviction for rape, sodomy, and malicious wounding because juror who knew of defendant's prior conviction on the same charges, which had been overturned and was being readjudicated, was not excused). And in cases where media coverage is so "extensive" that it precludes a party from "receiv[ing] a fair and impartial trial," we have held that trial courts must take protective measures, such as allowing change of venue, to ensure a fair trial. *See, e.g., State v. James*, 767 P.2d 549, 554 (Utah 1989). In fact, even in the face of countervailing constitutional concerns, we have allowed trial courts to issue temporary

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5 (...continued)
812, 57 Ill.Dec. 355, 428 N.E.2d 1035, 1037 (1981) (remanding for a new trial a collision case in which the jury referred to a boating handbook not admitted as evidence); *Brockie v. Omo Constr., Inc.*, 255 Mont. 495, 844 P.2d 61, 63-64 (1992) (reversing trial court's decision not to grant a new trial where jury foreman researched physics questions at issue in the case and reported his findings to other jurors); *Arthur v. Washington Iron Works*, 22 Wash.App. 61, 587 P.2d 626, 629 (1978) (ordering a new trial where jurors went to the public library "looking for handbooks" related to the case and "examin[ed] the yellow pages of the telephone book concerning" witnesses that had been called during trial).

restraining orders restricting during-trial publicity so that the parties hold a greater chance of receiving a fair trial. *See KUTV, Inc. v. Wilkinson*, 686 P.2d 456, 461 (Utah 1984). It is for this same reason that trial judges examine potential jurors at length about any outside information they may have received concerning the case at issue and whether they have any preconceived notions about the parties or the subject matter in dispute. Upon finding that such partiality exists, a judge will properly excuse that potential juror from service, just as courts repeatedly and appropriately instruct the eventually impaneled jurors not to discuss the case with anyone or to consider any media coverage of the suit or other outside evidence. *See* Model Utah Jury Instructions, Civil 1.8 (Michie 1993). In this case, however, the trial court nullified any prior efforts it had made to impanel a fair and impartial jury by itself giving the jury erroneous information, namely, that State Farm had already been found liable to Mrs. Campbell for bad faith. Had a potential juror admitted to such an erroneous belief upon reporting for duty, he or she certainly would have been excused. But here, it was the trial court's own instruction that misled the jury and, thus, encroached on State Farm's right to a fair trial.

¶ 149 Accordingly, the majority opinion's bare assertion that Mrs. Campbell's fraud and intentional infliction of emotional distress claims "provide[ ] an independent basis for sustaining all of Mrs. Campbell's damages" cannot support an affirmance of the lower court's judgment. Not only does Justice Durham fail to attempt to explain how those theories of liability account for the damages the jury actually awarded, but the judgments rendered to Mrs. Campbell on her claims for fraud and intentional infliction of emotional distress are void ab initio due to the court's breach of State Farm's right to a fair trial.

B. Punitive Damages

¶ 150 Apart from the problems created by the lower court's denying State Farm its right to a fair trial, the court's multiple erroneous instructions to the jury that liability had been found as to Inez Campbell for bad faith prejudiced State Farm further by skewing the fundamental considerations required for determining punitive damages.

¶ 151 The jury was asked in the second stage of the bifurcated trial to award damages to both Curtis Campbell and Inez Campbell, and in doing so awarded *compensatory damages* to Curtis Campbell in the amount of $1.4 million and to Inez Campbell in the amount of $1.2 million. The jury was also asked to award *punitive damages*, if any, which it did in the amount of $145 million but without designating which portion of the amount was awarded to Inez Campbell and which portion was awarded to Curtis Campbell.

¶ 152 In its determination of punitive damages, the jury had been specifically instructed by the trial court to consider, among other things, "the effect of defendant's misconduct on the lives of the Campbells," "the relationship between the parties," and "the amount of compensatory damages awarded." This jury instruction was given in compliance with our decision in *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991), which held that a jury awarding punitive damages must be charged with considering seven factors in order to determine the appropriate amount of the award. These factors include "(i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) *the effect thereof on the lives of the plaintiff and others*; (v) the probability of future recurrence of the misconduct; (vi) *the relationship of the parties; and (vii) the amount of actual damages awarded*." *Crookston*, 817 P.2d at 808 (emphasis added). However, because the jury was operating under the false assumption that State Farm was liable

to Inez Campbell for bad faith, it could not possibly have given proper consideration to each of these factors, and the majority consequently sets dangerous precedent by reinstating the jury's original punitive award for $145 million rather than remanding to the trial court for further deliberations on punitive damages.

¶ 153 Indeed, the jury granted Mrs. Campbell $1.2 million in compensatory damages for her injury, and we can only assume that the jury followed the judge's instructions and based its punitive award, at least partially, on the effect of State Farm's alleged misconduct on Mrs. Campbell's life. *See, e.g.*, *Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270, 275 (Utah 1992) ("[J]urors are sworn to follow the instructions as given by the court...."). As instructed by the court, the jury understood a good portion of such misconduct to include State Farm's breach of its duty of good faith and fair dealing, but as explained, State Farm did not owe Mrs. Campbell such a duty and no jury had ever found that State Farm had breached it to her. This is enough by itself to require a reassessment of the punitive award at the trial level, since the judgment rendered to punish State Farm is inexplicably tied to "misconduct" that State Farm did not--and could not--commit.

¶ 154 Moreover, the punitive award does not reflect an appropriate consideration of *Crookston*'s sixth factor, the relationship of the parties. The analysis undertaken by any jury properly employing our seven factors for punitive damages will be fundamentally altered when informed that, as a matter of law, one of the plaintiffs in the case has no standing to sue for one of the claims lodged. Especially here, where Mrs. Campbell's claim for bad faith was her only assertion of a fiduciary relationship with State Farm, it is imperative that we remand the punitive damages award for further proceedings. To be sure, even if Inez Campbell's remaining claims for fraud and intentional infliction of emotional distress survived the prob-

lems created by the unfair trial given to State Farm in this case, which they do not, they neither create nor demonstrate any relevant legal relationship between Mrs. Campbell and State Farm. The precise effect such a revelation would have had on the jury falls only within the realm of pure speculation, but given our own mandate that the jury consider, not a fictional, but the actual "relationship of the parties" in determining punitive damages, this too requires that we remand to the trial court for further proceedings.

¶ 155 Finally, the punitive damages award must fail because it was awarded jointly to Mr. and Mrs. Campbell rather than separately to each plaintiff. Even if the trial court had properly severed Inez Campbell's claims from her husband's, which it did not, the punitive award would have to be remanded under *Crookston* due to its joint nature. Mrs. Campbell's claims were entirely independent from Mr. Campbell's, but because punitive damages were awarded jointly as to both these plaintiffs, we cannot now know what portion of the award the jury intended to be owed to Inez Campbell and what portion it intended to be owed to Curtis Campbell. Accordingly, because Mrs. Campbell's claims for fraud and intentional infliction of emotional distress must be remanded while Mr. Campbell's need not--and because, as explained, the jury was inappropriately instructed to commingle the two plaintiffs in its consideration of the fourth and sixth *Crookston* factors--the punitive damages award must be vacated and remanded for further proceedings.[6]

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[6] Contending that *Crookston* does not question the legitimacy of joint punitive damage awards, the majority opinion assails the argument that the punitive award in this case must be vacated. However, the majority's (continued...)

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[6] (...continued)
contention must fail for at least two reasons. First, in characterizing the necessity for vacating the punitive award solely "due to its joint nature," Justice Durham oversimplifies the reasons stated above for why the award must fail. While *Crookston* did recognize the policy objectives of punitive damages to include "punish[ment] and deter[rence]," 817 P.2d at 807, we specifically held in *Crookston* that awards rendered for such purposes must be constrained by well established "parameters" that tether punitive damages to some sense of reasonableness in order to avoid "excessive awards." *Id.* at 808. Those parameters include the seven factors listed above, which "must be considered [by the jury] in assessing the amount of punitives." *Id.* (emphasis added). Because, as explained above, the jury was unable to properly consider two of those factors in this case due to the trial court's erroneous instruction that State Farm had been found liable to Mrs. Campbell for bad faith, the punitive award must be vacated and remanded. *See id.*; *C.T. ex rel. Taylor v. Johnson*, 1999 UT 35, ¶¶ 17-26, 977 P.2d 479 (upholding a punitive award only because the trial court's failure to instruct the jury to consider all of the seven *Crookston* factors was harmless since the jury did in fact fully and properly assess each factor); *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 458-59 (Utah 1993) (affirming a punitive award because the jury "made a detailed finding based on the seven factors enunciated in *Crookston*"). Indeed, nowhere in her opinion does *Justice* Durham even attempt to address this issue. Second, there is good reason why the "joint nature of (continued...)

IV. CONCLUSION

¶ 156 Inez Campbell had no standing to sue State Farm for bad faith, and the jury never found that State Farm was liable to her in that regard. Her only actionable claims were for fraud and intentional infliction of emotional distress. As a result, the trial court's multiple instructions that State Farm had been found liable to Mrs. Campbell for bad faith tainted both the entire verdict as to Mrs. Campbell and the punitive damages assessed against State Farm in behalf of Mr. Campbell. Accordingly, I would (1) reverse as to Mrs. Campbell's claim for bad faith, (2) vacate and remand for a new trial on Mrs. Campbell's claims for fraud and intentional infliction of emotional distress, (3) affirm on the issue of State Farm's liability to Mr. Campbell, and (4) vacate and remand for a new trial on the issue of punitive damages as to Mr. Campbell inasmuch as that award was rendered jointly to both Mr. Campbell and Mrs. Campbell.

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6 (...continued)
the punitive damages award was never questioned" in *Crookston*. Unlike the case now before us, neither of the parties involved in *Crookston* ever had their standing to sue questioned, nor was the issue raised on appeal. Consequently, the problematic situation created here--where one party who was awarded punitives had every right to sue but the other party given the same award should have never been involved in the lawsuit--simply did not exist in *Crookston*. *See* 817 P.2d at 794 (recognizing that both Mr. and Mrs. Crookston were named as insureds in their homeowner's policy).

DECISION BY
THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
DATED AUGUST 3, 1998

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,	)
Plaintiffs,	) COURT'S FINDINGS, CONCLUSIONS AND ORDER REGARDING PUNITIVE DAMAGES AND EVIDENTIARY RULINGS
vs.	)
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	) Civil No. 890905231
Defendant.	) Judge William B. Bohling

¶ 1 The above matter came before the Court on June 4, 1996, for Phase II of the bifurcated trial. Following 29 days of trial, on July 31, 1996, the jury returned a special verdict in favor of plaintiffs, answering all interrogatories in their favor and awarding damages as follows: $1.4 million in general compensatory damages to plaintiff Curtis Campbell; $1.2 million in general compensatory damages to plaintiff Inez Campbell; and $145 million in punitive damages to plaintiffs jointly. On August 8, 1996, the Court entered judgment against

State Farm in these amounts, together with special damages of $2,086.75 ($911.25 plus $1,175.50 in prejudgment interest) plus post-judgment interest at the legal rate until paid.

¶ 2 Defendant State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") then filed a variety of post-trial motions. Following exhaustive briefing of all issues, with several hundred pages of factual and legal argument submitted by each side, the Court held a two-day hearing on the motions on December 18-19, 1997. Having reviewed the parties' briefs, portions of the trial transcript and exhibits, and its own notes of the trial, at the conclusion of oral argument on each issue the Court issued a decision and preliminary bench opinion. The Court has set forth in separate orders its rulings with respect to the bulk of State Farm's motions.

¶ 3 The instant filing concerns State Farm's interrelated motions objecting to the punitive damages award and the scope of the evidence considered during Phase II. For the reasons stated below, the Court declines to grant most of the relief sought through these motions, but grants the aspect of State Farm's motion seeking a remittitur with respect to the amount of the punitive damages. For the reasons set forth herein, the Court has ordered that plaintiffs elect either a new trial or a remittitur of the punitive damages down to $25 million. The Campbells have accepted a remittitur in this amount, in lieu of a new trial, through an election filed January 6, 1998. The Court sets out the basis of its rulings with respect to punitive damages in Part I. It sets out the basis of its rulings with respect to the scope of the evidence considered at trial in Part II.

I.

MOTIONS RELATING TO PUNITIVE DAMAGES AWARD

¶ 4 State Farm makes essentially four arguments with respect to the jury's award of punitive damages: (1) that it is entitled to judgment n.o.v. as to liability; (2) that, in the alternative, it is entitled to a new trial because the jury was supposedly invited to punish it for all its bad acts throughout the nation during the past two decades; (3) that it is entitled to a new trial, or at least a remittitur, because the $145 million in punitive damages awarded by the jury is excessive; and (4) that, because supposedly the only explanation for the jury's award of $145 million is that the jury was inflamed by passion and prejudice, sparked by, the allegedly inflammatory summation of the Campbells' counsel, only the grant of a new trial (not a remittitur) can cure this claimed defect.

¶ 5 For the reasons explained hereafter, the Court rejects the first, second and fourth arguments, but accepts the third in part. The Court sets forth its final findings and conclusions pertinent to the issues raised by State Farm as follows.

A. *Motion for Judgment N.O.V. on Punitive Liability*

¶ 6 State Farm argues for judgment n.o.v. on punitive damages on liability on the basis that when it "had the opportunity to settle for policy limits but failed to do so, Utah law did not clearly recognize an action for bad faith failure to settle if the insurer ultimately paid the excess verdict in full," so that State Farm "manifestly lacked fair notice" that its course of action "could subject it not only to liability for compensatory damages under a bad faith theory, but also to punishment," thereby depriving it of due process of law. State Farm Opening

Memorandum at 30-31. The Court denies this motion for several separate reasons.

¶ 7 First, the Court believes that this argument was waived by State Farm's failure to raise it in a Rule 50(a) motion for a directed verdict. *See Pollesche v. Transamerican Ins. Co.*, 27 Utah 430, 433 n.1, 497 P.2d 236, 238 n. 1 (1972) ("The failure of a party to make a motion for a directed verdict . . . forecloses the trial court from consideration of a motion for judgment notwithstanding the verdict"); *see also First Gen. Servs. v. Perkins*, 918 P.2d 480, 487 (Utah App. 1996).

¶ 8 Second, the Court believes that this argument is barred by the law-of-the-case doctrine, as the Court of Appeals, in its earlier consideration of the case, specifically held that the Campbells should be given an opportunity to prove their entitlement to punitive damages. *Campbell v. State Farm*, 840 P.2d 130, 142 & n.24 (Utah App. 1992).

¶ 9 Third, a due process objection based on the absence of notice is available, even in a criminal case, only where a court has announced "an unforeseeable judicial enlargement of a criminal statute, applied retroactively," that operates like an *ex post facto* law. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964); *see also Osborne v. Ohio*, 495 U.S. 103, 117 (1990); *Rose v. Locke*, 423 U.S. 48, 53 (1975). State Farm's claim that it had no fair notice of possible punitive damages liability when it was handling the *Campbell* file in 1983 rests on an out-of-context quotation from the Court of Appeals' earlier decision in this case, namely, its observation that the existence of a bad-faith action despite the insurer's ultimate payment of the excess verdict was "one of first impression in Utah." *Campbell*, 840 P.2d at 137 (quoted in State Farm Opening Memorandum at 30). But the Court of Appeals went on to note that "prior Utah Supreme Court cases" dating as far back as 1969 (fourteen

years before State Farm's refusal to settle the *Campbell* case) "compel the conclusion we reach," which the Court of Appeals described as "a natural outgrowth" of earlier precedents. *Id.* at 137, 140 n.19. Thus, even the *Bouie* test for fair notice in a criminal case is met here. Furthermore, State Farm's own documents indicate that it was aware well before its handling of the *Campbell* case of its potential punitive damage exposure for the mistreatment of its insureds.

¶ 10 Fourth and finally, even if State Farm's notice argument were accepted, by its terms it is limited to the argument that State Farm lacked notice that its bad faith toward the Campbells could lead to an award of punitive damages. The punitive damage award is separately supportable based on the other two intentional torts found by the jury: intentional infliction of emotional distress and fraud. State Farm does not contend that during its handling of the *Campbell* case it lacked fair notice that either of these intentional torts could lead to the imposition of punitive damages.

B. *Motion for New Trial Based on Claim of Extraterritorial Punishment*

¶ 11 State Farm argues that the jury was invited to punish it in this proceeding for all its bad acts committed nationwide during the past two decades, thus assertedly interfering with the sovereignty of other States and penalizing State Farm for activities that are possibly lawful in other States. State Farm Opening Memorandum at 89-97. According to State Farm, the only permissible remedy for this asserted flaw in the trial is a new trial, as "there is no way to determine what the jury would have done had it been limited to punishing State Farm for Utah conduct alone." State Farm Opening Memorandum at 94. The Court rejects this argument for three separate reasons.

¶ 12 First, this argument has been waived. State Farm raised no constitutional objection at trial against the testimony or statements in closing argument of which it now complains, as the Campbells have demonstrated, *see* Campbell Opening Memorandum at 173-75 & n.100, and State Farm concedes. *See* State Farm Reply Memorandum at 69 & n.35. (It should also be noted that not only did State Farm fail to raise a constitutional objection to any statements in the closing argument of plaintiffs' counsel, but State Farm made no objection of any kind to the particular statements of which it now complains).

¶ 13 Second, the Campbells never requested the jury to use this proceeding to punish State Farm for bad acts occurring outside of Utah. State Farm's suggestions to the contrary, *see* State Farm Opening Memorandum at 89-91, rely on out-of-context quotations from the Campbells' closing argument (it is worth noting that State Farm made no objection to the closing argument statements in question), as the Campbells set out in their brief in detail, *see* Campbell Opening Memorandum at 174-75 n.100. Compare *BMW of North America. Inc. v Gore*, 110 S. Ct. 1589, 1593-94 (1996) (plaintiffs' counsel asked jury to punish BMW in the amount of $4,000 for each of approximately 1000 cars sold nationwide without disclosure of repainting, despite the fact that only fourteen such cars had been sold within Alabama, and nondisclosure was apparently lawful in most States).

¶ 14 Third and finally, ample precedent establishes that it was entirely proper for the jury to consider the Campbells' evidence of State Farm's wrongful claim-handling policies and practices, based on evidence from inside and outside Utah, both in evaluating the reprehensibility of State Farm's policies that led to the injuries suffered by the Campbells, and in deciding what amount of punitive damages was needed both to punish

State Farm for its wrongful business policies in Utah and to deter the continuation of such policies in the future. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 450-51, 462 n.28 (1993) (plurality opinion) (observing that evidence that defendant "had engaged in similar nefarious activities in its business dealings in other parts of the country" was properly considered by the jury; "[u]nder well-settled law, . . . factors such as these are typically considered in assessing punitive damages."); *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598 nn. 19 & 21 (1996) (reaffirming *TXO* holding that "such [out-of-state] evidence is relevant to the determination of the degree of reprehensibility of the defendant's conduct," and noting that even "lawful conduct that bears on the defendant's character and prospects for rehabilitation" is properly considered in setting appropriate punishment). Even in the context of criminal sentences, where the interests of a defendant are greater than the interests of a defendant facing the imposition of punitive damages, *see Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 23 n.11 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989), criminal penalties are routinely upheld despite being predicated on the consideration of out-of-state conduct, even where that conduct has not been adjudicated unlawful, and even where that conduct is in fact lawful. *See, e.g., Williams v. New York*, 337 U.S. 241, 247 (1949) ("fullest information possible concerning the defendant's life and characteristics" traditionally considered); *United States v. Tucker*, 404 U.S. 443, 446 (1972) (inquiry may be "broad in scope, largely unlimited either as to the kind of information [the court] may consider, or the source from which it may come."); *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994) (defendant's past criminal behavior may be considered, "even if no conviction resulted from that behavior"); *United States v. Watts*, 117 S. Ct. 633, 635 (1997) (per curiam) (trial judge is free to consider evidence of alleged offenses even where the defendant has already been acquitted by a jury on all

the allegations, so long as trial judge believes that the offenses have been demonstrated "by a preponderance of the evidence"). Indeed, in its reply brief, State Farm explicitly acknowledged the controlling nature of this line of authority; agreed that it was not error for the jury to consider out-of-state evidence; and affirmatively noted that, if properly admitted under Utah R. Evid. 404(b), such evidence "may be considered in determining which amount [of punitive damages], within a range of reasonable punishments, the jury should select." State Farm Reply Memorandum at 70.

¶ 15 For all these reasons, the Court denies State Farm's motion for a new trial on this ground.

C. *Motion for New Trial or Remittitur Based on Size of Punitive Damages Award*

¶ 16 State Farm argues at length that it is entitled to a new trial, or at least a remittitur, because the $145 million in punitive damages awarded by the jury are excessive. *See* State Farm Opening Memorandum at 97-112. In support of this argument, State Farm relies primarily on the Utah Supreme Court's decisions in *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991) ("*Crookston I*"), and *Crookston v. Fire Ins. Exch.*, 860 P.2d 937 (Utah 1993) ("*Crookston II*"), and the U.S. Supreme Court's decision in *BMW of North America v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). For the reasons set forth below, the Court finds that the punitive damages awarded by the jury were excessive and therefore has granted State Farm's motion for a remittitur (since accepted) or, in the alternative, for a new trial had the Campbells desired a new trial. As the Court will explain, given its interpretation of the "ratio factor" set out by the Utah Supreme Court in the *Crookston* decisions, the Court believes that a 25-to-1 ratio between the punitive damages and the compensatory damages is appropriate here,

authorizing a punitive damages award, as remitted, of $25 million.

¶ 17 Because the ratio is greater than the presumptively appropriate 3-to-1 ratio, the Court sets out in some detail here why an award of this amount is justifiable under the seven *Crookston* factors, as the Utah Supreme Court has required in this context. *See Crookston I*, 817 P.2d at 811-13; *Crookston II*, 860 P.2d at 940. Further, the Court explains why State Farm's objection that the amount of the jury's punitive damage award is "grossly excessive," in violation of federal substantive due process in light of *BMW v. Gore*, is not well taken.

1. Jury Instructions

¶ 18 In considering the arguments concerning the amount of the punitive damages, it is helpful to review the instructions that were given to the jury on this subject. Consistent with the law, the jury was instructed in accordance with the *Crookston* factors as follows. The basic charge with respect to punitive damages was instruction No. 59, which reads:

> In addition to the compensatory damages, the Campbells also seek an award of punitive damages against State Farm. Punitive damages may be awarded only if compensatory damages are awarded.
>
> Before punitive damages may be awarded against State Farm, you must find by clear and convincing evidence that the insurance company's conduct toward the Campbells was willful and malicious, or such conduct was done with a knowing and reckless indifference toward, and disregard of, the Campbells' rights and well being.
>
> If you so find, you may award, if you deem it proper to do so, such sum as in your judgment would

be reasonable and proper as a punishment for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind they are only for the purpose just mentioned and not the measure of compensatory damages.

In determining the amount of punitive damages, you should consider each of the following factors:

1. the relative wealth of the defendant;
2. the nature of the defendant's misconduct;
3. the facts and circumstances surrounding the defendant's misconduct;
4. the effect of defendant's misconduct on the lives of the Campbells and others;
5. the probability of future recurrence of the misconduct;
6. the relationship between the parties; and
7. the amount of compensatory damages awarded.

Punitive damages should be more than an inconvenience to the defendant and their amount should be sufficient to discourage the defendant and others similarly situated from doing or repeating such misconduct in the future.

Instruction No. 60 added:

You are instructed that punitive damages constitute an extraordinary remedy outside the field of usual redress remedies which should be applied with caution lest, engendered by passion or prejudice because of a wrongdoing, the award becomes unrealistic or unreasonable. Plaintiffs are not automatically entitled

to punitive damages and the law does not require you to award punitive damages to plaintiffs.

The law provides no fixed standard as to the amount of punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice, however, the law requires that any award for such damages must bear a reasonable relationship to the actual or potential harm resulting from the defendant's conduct.

Instruction No. 61 reads:

A defendant's conduct must be malicious or in reckless disregard for the rights of others, although actual intent to cause injury is not necessary. That is, the defendant must either know or should know "that such conduct would, in a high degree of probability, result in substantial harm to another," and the conduct must be "highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of harm is apparent."

¶ 19 The principles set forth in these instructions should be kept in mind in deciding whether or not the damage awards are excessive. It is worth noting that State Farm has raised no claim of instructional error in its post-trial motions. At no time before the jury's verdict did State Farm take the position that the jury should not be instructed to consider the seven *Crookston* factors in deciding the amount of punitive damages.

¶ 20 State Farm's post-trial positions are not entirely consistent with its own proposed jury instructions. For example, with respect to its post-trial motions, State Farm argues that the proper amount of punitive damages in this case cannot be evaluated, even in part, based on a corporation's

wealth: indeed, State Farm argues that it is illogical to even refer to a corporation as possessing "wealth." State Farm Opening Memorandum at 105-07. State Farm's own proposed jury instruction No. 40 lists seven factors for the jury to consider in determining the amount of punitive damages. The first factor listed is: "The relative wealth of State Farm." In instruction No. 59, the jury was properly instructed, without objection, that it should "consider the relative wealth of the defendant." Accordingly, in spite of State Farm's current position, it is plain that its wealth (as well as the other six *Crookston* factors), may be considered in evaluating whether the jury's award is excessive.

¶ 21 A persistent theme running through State Farm's briefing is that whether or not the punitive damages awarded are excessive must be determined solely by reference to the evidence concerning what State Farm did to the Campbells, and what punishment is appropriate for those actions considered in isolation — ignoring the Campbells' entire institutional case and all the evidence of similar misconduct by State Farm toward other Utah consumers during the past two decades.

¶ 22 However, beyond the objective of punishment, the jury instructions also properly allowed the jury to consider appropriate deterrence. Without objection from State Farm, the jury was directed in instruction No. 59 to set punitive damages based on "the nature of the defendant's misconduct" and "the probability of future recurrence of the misconduct." The Campbells' institutional case set forth ample evidence that the nature of State Farm's misconduct was pervasive: that it involved not an isolated instance of wrongdoing toward the Campbells or the occasional consumer, but instead a company-wide claim-handling policy of providing incentives to adjusters to systematically deny Utah consumers benefits owed to them under insurance policies (incentives that were never disclosed

to consumers). There was ample evidence that this was done as part of a deliberate and wrongful effort to enhance corporate profits, a scheme that was orchestrated by top officials; that this policy caused the mishandling of the *Campbell* file; and that it continues to cause many other consumers to be wrongfully denied insurance benefits on a widespread basis.

¶ 23 Further, instruction No. 59 directed the jury to focus on awarding a sum that would serve "as a wholesome warning to others not to offend in like manner," and "discourage the defendant and others similarly situated from doing or repeating such misconduct in the future." Given these various aspects of the jury instructions, State Farm's main argument against the amount of punitive damages — that it cannot be supported based on a narrow analysis of what was done to the Campbells alone, ignoring the Campbells' entire institutional case — is fundamentally misguided.

¶ 24 The Court now turns to State Farm's remaining arguments with respect to the *Crookston* and *BMW v. Gore* factors and to an explanation of why the Court has ordered a remittitur that reduces the punitive damages payable by State Farm to $25 million.

2. *Crookston* Factors

¶ 25 The Court addresses the seven *Crookston* factors as follows.

a. Relative Wealth of State Farm

¶ 26 State Farm's wealth is enormous, as no one would dispute. The evidence indicates that State Farm's surplus increased from $2.65 billion in 1977 to $25 billion in 1995. Its assets increased from $ 6.3 billion in 1977 to $54.75 billion in

1995, at an average increase of $4.3 million per working day in surplus, and $9.3 million per working day in assets. These numbers are important in assessing what amount of punitive damages is reasonably necessary to get the attention of State Farm officials and spur action to eliminate the wrongful conduct involved. "[P]unitive damages should be more than an inconvenience" to a wrongdoer, *Cruz v. Montoya*, 660 P.2d 723, 727 (Utah 1983), and it appears that "a typical ratio for a punitive damages award to a defendant's net worth may be around one percent." *Cash v. Beltmann North Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990). A punitive damages award equal to one percent of State Farm's wealth would be $547.5 million. The remitted amount of $25 million in punitive damages represents less than 1/20th of one percent of State Farm's wealth (.0457 per cent).

¶ 27 As a benchmark, it is worth noting that the remitted amount of punitive damages in this case, expressed as a percentage of wealth, is less than one-tenth the punitive damages award upheld by the Utah Supreme Court against the insurance company defendant in *Crookston* (there, approximately one-half of one percent of wealth).

¶ 28 Considerable evidence at trial from State Farm's own witnesses affirmatively established that punitive damages in the range of $145 million, about one-quarter of one percent of its wealth, appear necessary to capture the attention of top corporate officials and ensure that they monitor and change corporate policies as may be appropriate in reaction to punitive damage awards. Regional vice president, Buck Moskalski, State Farm's top official over Utah and an employee designated under Rule 30(b)(6) as knowledgeable about punitive damages against the company, testified that State Farm has no system in place to track or record punitive damage awards, or even to report them to top officials, and that he did not himself plan to

report to headquarters any punitive damages award in this case. 21 Tr. 157, 171-72. Other testimony established that, because of State Farm's lack of any monitoring of punitive damage verdicts, even a $100 million award in Texas several years ago was never learned of, much less acted on, by headquarters. 11 Tr. 107-10. Given that Stare Farm is so wealthy that this earlier $100 million verdict (less than 0.18 percent of its wealth) was too small for top management even to notice, the jury's $14.5 million award (approximately 0.26 percent of its wealth) cannot be viewed as excessive under the wealth factor. (By contrast, there was no evidence of this sort presented in *Crookston*, to support the award there, which was double the award of the jury here, expressed as a percentage of wealth).

b. Nature of State Farm's Misconduct

¶ 29 The second *Crookston* factor, which mirrors the *BMW v. Gore* "reprehensibility" factor, likewise strongly supports the punitive damages awarded by the jury. Whether a defendant's misconduct is of a reprehensible nature is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 116 S. Ct. at 1599. The U.S. Supreme Court has singled out for special condemnation schemes of "trickery and deceit," especially when they target people who are "financially vulnerable" and involve "repeated misconduct." Id. Further, the Court has identified as particularly reprehensible a defendant's use of "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." *Id.* at 1601.

¶ 30 There is ample evidence in the record from which the jury could reasonably conclude that all of these elements of reprehensibility are present in the corporate policies that were responsible for injuring the Campbells, that have injured many other Utah consumers during the past two decades, and that

continue today. The evidence has been summarized in detail by the Campbells in their briefs, *see* Campbell Opening Memorandum at 12-143; Campbell Surreply Memorandum at 13-41, and at oral argument on the post-trial motions. The Court here briefly summarizes three key aspects of the evidence that are important to understanding its analysis of the reprehensibility of State Farm's misconduct: (i) State Farm's official policy of giving its adjusters undisclosed incentives to deny consumers benefits owed them, in order to enhance corporate profits by wrongfully turning its claim-handling process into a profit center; (ii) State Farm's use of various wrongful means to conceal this profit scheme and evade punishment for it; and (iii) the impact of these profit and evasion schemes on the Campbells specifically.

¶ 31 ***i. State Farm's policy of using its auto insurance claim-handling process as a profit center by offering its claims adjusters undisclosed incentives to wrongfully deny benefits owed consumers***. The record contains a large body of evidence, in the form of State Farm's own internal corporate documents, the testimony of its current and former employees, and credible expert testimony, that over a period of approximately two decades, State Farm has pursued an official policy of using its auto insurance claim-handling process as a profit center, by systematically providing its claim adjusters with unlawful incentives to wrongfully deny benefits owed consumers.

¶ 32 At the outset, to appreciate the force of this evidence it is important to understand the well-accepted standards for what sources of profit are permissible in the insurance industry, what sources are impermissible, and how this relates to the appropriate compensation systems for insurance adjusters. The Campbells provided credible, uncontroverted expert testimony on this point. *See* Campbell Opening Memorandum at 45-53.

In brief, insurance is a public trust sort of business, in which the insurance company takes in premiums to cover a pool of risk, and the customer, as well as the public generally, has to be able to trust that the insurance company, once a risk turns into a harm at a later date, will timely pay fair value on the claim after due investigation. The claims adjuster should be allowed to handle each claim on its merits, without having incentives or pressures to underpay claims in an attempt to meet arbitrary average payment-per-claim goals designed to enhance corporate profits. In the insurance business, it is universally accepted and was uncontroverted at trial, that insurers must not seek to enhance profits by intentionally underpaying claims, but that companies must focus on building profits by such means as enhancing their ability accurately to assess risk and thus price their product appropriately, increasing their customer base by effective marketing, maximizing their investment income on premium monies prior to payout, and achieving efficiencies in their operations generally.

¶ 33 The evidence made clear that in the insurance business it is regarded as essential that an insurance company may not properly seek to increase its profits by pressuring its claim adjusters to pay out less than is owing on claims, even if this could be easily done by taking advantage of people who have no idea what claims are worth, or who are so in need of funds that they would be forced to accept far less than is fairly owing if the only alternative were substantial delay and/or a need to institute litigation. The reason is that the core function of the insurance business is to timely pay fair value in the event of a loss, so that fulfilling this function requires an insurance company to blind itself to the economic advantage it could obtain if it were to use its superior knowledge and financial leverage to pay out less than what claims are actually worth. Thus, it is universally accepted within the industry that the compensation of claim adjusters cannot be set based on

whether or not their claim payouts save the company money; if that were allowed, adjusters would be systematically induced to pay out less than is fairly due. The public trust aspect of the insurance industry dictates that the incentives of claim adjusters must be set in line with the underlying insurance function: to timely pay out fair value on claims, no more and no less.

¶ 34 Indeed, the slogan that State Farm purports to have its adjusters follow is that "we pay what we owe, not a penny more, not a penny less." Unfortunately, reality does not comport with this slogan. The record contains extensive evidence that for approximately two decades, State Farm has disregarded well-accepted industry rules by turning its claims-adjusting process into a profit center, to the point of giving its claim adjusters specific numerical targets with regard to average payouts per claim. Meeting these targets leads to better pay and promotional prospects; missing them leads to criticism, retarded prospects at the company and, ultimately, a threat to one's continued employment.

¶ 35 A variety of internal documents generated by State Farm during the 1970s and 1980s demonstrate the decision of top management to pursue the explicit objective of using the claims-adjustment process as a profit center. One of the more important pieces of evidence of an unlawful policy is the document dated May 1, 1979, laying out State Farm's "Performance, Planning and Review," or "PP&R," program. See PX-57(1), Tab 10. (It should be noted that this important document was not produced by State Farm, which aims to have destroyed it, but was obtained by the Campbells by subpoena from a former State Farm claims manager. The head of State Farm's document retention program, Dan Cochran, who testified at trial, would not commit that this document will not again be destroyed by State Farm at the conclusion of this case.) As the Campbells established with the aid of credible expert testi-

mony, this document, particularly when viewed in connection with related documents and the testimony of State Farm employees, provides valuable insights into State Farm's inherently wrongful method of running an insurance claims operation.

¶ 36 The PP&R program explicitly covers "all levels of employees" at State Farm, including claims adjusters, and seeks to "reward merit salary-wise"; analysis of each employee's work under the PP&R program is designed to "[r]ealistically support merit salary recommendations." "Merit," in the context of claims adjusting, is explicitly defined by the PP&R program as including the ability to meet preset targets for payouts each year — i.e., targets for payouts that are tied not to the severity and fair value of the claims that are being handled, but rather to State Farm's goals for making profits, by arbitrarily holding down payouts, for that year. (It bears emphasis that such arbitrary payment goals are set for claims that have not yet arisen, concerning accidents that have not yet happened.) Thus, the PP&R program requires supervisors to set goals for claim adjusters, at the start of each year, such as: "Hold BI [bodily injury] paid cost to (number) or less for (year)"; "List prior damage [i.e., report prior damage to cars involved in accidents] on x% of all estimates written by (date)"; and "Negotiate appearance allowances [i.e., a form of payout that, by definition, is made at less than the insured is entitled to receive under the policy] on x% of all estimates written by (date)."

¶ 37 The evidence further demonstrates that, in carrying out this PP&R program, which directly pressures adjusters to keep down payouts in order to meet these sorts of preset targets having nothing to do with the merits or actual value of the specific claims that an adjuster would encounter in the coming year, top State Farm management has informed adjusters that they are the "big spenders," who pay out over 70 percent of the

premium dollars paid by consumers, and that it is their responsibility to "shore up the bottom line" — i.e., to keep down payouts – in order to ensure that State Farm has the "most profitable claim service in the industry." 11 Tr. 5, 6, 44, 45; PX-57.

¶ 38 The Campbells presented specific testimony, by Fye and Prater, demonstrating that this approach of using the PP&R program to mix the claim service function with the quest for greater corporate profits is inherently wrong. These experts testified that the PP&R incentive system cannot be justified "in any way," 17 Tr. 58, given the duty to treat insureds "honestly and fairly." 17 Tr. 43. They described such an incentive system as simply "taboo in the insurance industry," 11 Tr. 6; as "grossly unfair" to consumers, "absolutely wrong," "just absolutely what you would never want to see in a claims organization," 4 Tr. 58-59; as inherently fraudulent if not fully disclosed to the consumer (given that, if consumers were informed in advance of the incentive system no one would buy State Farm's policies), 11 Tr. 9; and as "creat[ing] a corporate culture that is predatory" and "take[s] advantage of the gullible and defenseless people." 4 Tr. 64; 11 Tr. 90.

¶ 39 State Farm's defense was that the PP&R program, despite its plain wording, at no point has enforced any such incentive system; that the PP&R program's sole function with respect to adjusters has been simply to encourage the setting of non-binding "awareness goals" that had no effect on pay or performance; and that, in any event, State Farm has discontinued the practice of setting average pay per claim goals, in directives issued in 1992 and 1994. However, the Campbells presented considerable evidence, both in the form of documents and through the testimony of current and former State Farm employees, that the PP&R program, including payout goals, has functioned, and continues to function, as an unlawful scheme to provide undisclosed incentives to adjusters to deny

benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits.

¶ 40 The evidence also clearly established that the PP&R program, including the arbitrary claims payout goals, has applied equally to the handling of both third-party and first-party claims.

¶ 41 The effect of the PP&R program's arbitrary claim payout targets on operations here in Utah, and particularly the constant pressure to reduce the money paid out on a year-to-year basis, was established by testimony that started with low-level claims adjusters, such as Felix Jensen and Ray Summers, and went up through the ranks of management. The collective picture of operations under the PP&R program presented by this evidence was one of unrelenting pressure to keep down payouts to meet arbitrary claim payment goals. For example, Felix Jensen, a current Utah State Farm employee of more than 30 years, testified as to the "many, many, many times" that high-level claims managers would pressure adjusters to revise downward their evaluation of what should be paid out on claims. Jensen went to top managers and pointed out the "intolerable situation" that was being created for adjusters, who were simply unable to run a properly functioning system in which fair value would be paid for claims. Jensen was bluntly instructed to "get out of the kitchen" if he could not stand the heat.

¶ 42 Samantha Bird, a longtime Utah State Farm claims supervisor, also experienced pressure to reduce payouts to well below fair value as a "recurrent, running theme." She, too, went to high-level management in an attempt to do something about it. Instead of being taken seriously, her complaints led to advice that she should be "more of a team player." Bird was

criticized by those higher in the management structure as being the only supervisor who argued against downward claim payout pressures. She endured for years constant criticism of her approach to claims handling. At times even she was forced to commit dishonest acts and to knowingly underpay claims. Bird ultimately tired of being forced to commit dishonest acts and resigned from the company.

¶ 43 Although Utah managers higher than Bird such as Noxon and Brown (both of whom are still employed at State Farm) did their best to deny that their operations were in any way improperly influenced by the PP&R program – which they characterized as simply suggesting the use of non-binding "awareness goals" concerning claim payouts – compelling evidence was introduced contradicting this testimony. A number of the documents evaluating and discussing the performance of Noxon and Brown and their subordinates contained explicit preset average payout goals. In particular, Brown's PP&R evaluations included repeated references to the need to reduce average payments on claims (in spite of inflationary pressures driving up medical bills, auto repairs, wages, etc.), with Brown boasting about his success in doing so, in the course of seeking (successfully) a transfer to a more desirable location.

¶ 44 Further, the Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP&R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated from the highest levels of corporate management. Moreover, the record contains substantial evidence that, contrary to State Farm's claims that it "obsoleted" average payment goals through memos circulated in 1992 and 1994, the practice was still being carried out at the

time of trial in 1996. The only difference is that the arbitrary payout goals, designed to enhance bottom-line corporate profits, are no longer set out in writing: to make it more difficult to prove how the program operates to injure consumers, this key element of the program is now carded out verbally.

¶ 45 Finally, the record demonstrates in considerable detail the use by State Farm adjusters of a wide variety of highly unfair and dishonest methods to drive down average payouts on claims, in circumstances that make it clear that the affected consumers are being routinely denied the fair benefits of the relevant insurance policies. Just the testimony of Ray Summers alone (the adjuster who handled the Campbell case and who was a State Farm employee in Utah for almost twenty years) outlined more than a dozen such methods, including the falsifying or withholding of evidence in claim files, one of the fraudulent tactics which was used, at Bill Brown's direction, in handling the *Campbell* case. 12 Tr. 188. Summers was praised for his effective use of unfair and dishonest claims practices and was encouraged by management to teach them to others. His supervisor told current long-term State Farm employee, Marilyn Poulson, who questioned the honesty of the practice, that Summers' falsification of documents was "good business, it helped to settle claims." 13 Tr. 162-63.

¶ 46 A number of other witnesses and documents described additional methods used by State Farm in dishonest and unfair ways to reduce claim payments. Although State Farm denied that it has conducted claim-payout related contests, documentary evidence was presented of such contests being held, at the instance of management, which encouraged the use of unfair settlement tactics.

¶ 47 *ii. State Farm's use of unlawful and unethical means to conceal its profit scheme and evade punishment for it.* The

record also contains ample evidence that, throughout at least the past two decades, State Farm has resorted to a variety of wrongful means to attempt to evade detection of, and liability for, its unlawful profit scheme. Using these tactics, State Farm has managed to construct a nearly impenetrable wall of defense against punishment for its wrongdoing, one so effective that it is able to pressure its adjusters to deny consumers insurance benefits with impunity, knowing: (1) that few of its victims will even realize that they have been wronged; (2) that fewer still will ever be able to sue; (3) that only a small fraction of those who do sue will be able to weather the years of litigation needed to reach trial; and (4) that any victims who do actually reach trial will have great difficulty establishing the basis for punitive damages when met with claims that only an "honest mistake" was made, supported by a body of evidence that has been systematically sanitized, padded, purged, concealed, destroyed or rehearsed.

¶ 48 The record indicates that these evasion tactics are so successful that State Farms trains its employees to ignore the threat of punitive damages in making their claim-handling decisions. State Farm has relied on five principal evasion tactics, each of which is reprehensible.

¶ 49 ***a. Systematic targeting of vulnerable and defenseless consumers.*** The record clearly supports the conclusion that State Farm's undisclosed policy of using its claim-handling process as a profit center to systematically deny benefits owed to consumers is deliberately crafted to prey on "the weakest of the herd" – the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value. The testimony from Ray Summers, Bruce Davis and Ina DeLong on how they were

trained to target such consumers, and the expert testimony from Gary Fye covering the various tactics predicated on this philosophy and the internal company documents demonstrating this philosophy in action, was especially significant.

¶ 50 ***b. Systematic destruction of documents, requested in litigation, that reveal the profit scheme.*** The record contains considerable evidence concerning State Farm's aggressive efforts to "manage" documents that might damage it in bad-faith litigation, including evidence of extensive efforts to erase large portions of the corporate memory. As the Campbells urged at trial, and have reiterated at length in their post trial briefing, the evidence of State Farm's systematic and long-running efforts to destroy internal company documents revealing its profit scheme supports an inference that State Farm was seeking to minimize the possibility that it would be punished for its underlying misconduct.

¶ 51 State Farm's own expert witness on records management, Robert Williams, set out an appropriate benchmark for assessing the propriety of State Farm's document destruction efforts. Williams testified to three basic principles of proper records management: (1) given the large volume of information involved in transacting business, a corporation needs to have a "corporate memory," by retaining information documenting the nature of its past activities; (2) it would be "abhorrent" and "absolutely" not proper for a corporation to seek out documents on corporate practices that it views as unfavorable, replace them with new versions, and destroy the original versions, so that someone who later wanted to find out what happened would get a distorted picture; and (3) it would be improper for a corporation to retrieve documents from discovery in a completed case and destroy them while they are subject to document requests in other cases, while representing in the other cases that such documents do not exist.

¶ 52 The record reveals that State Farm violated all three of these principles on multiple occasions, in an obvious effort to evade liability for bad-faith claim handling, as summarized by two experts called by the Campbells familiar with State Farm's document management practices, Gary Fye and Steve Prater. Many documents that were critical to the Campbells' proof in this case were obtained not through discovery directed to State Farm, but through the fortuity that State Farm employees happened to retain them after leaving the company, or that Fye uncovered and retained copies during the 1970s and 1980s in the process of investigating the company's claim-handling practices, often as part of litigation against the company.

¶ 53 One example of State Farm's document destruction efforts is noteworthy. It undisputed that, in accordance with sound records management practices, on November 16, 1988, State Farm had at its corporate headquarters a special historical department that contained a copy of all past manuals on claim-handling practices and the dates on which each section of each manual was changed. Thus, State Farm had a "corporate memory" of its past manuals, including the manuals that applied to the claim against Curtis Campbell in 1981 through 1983, from which it could easily satisfy discovery requests with respect to such manuals. It is conceded by State Farm's own experts that given then available and currently available compact storage mechanisms, all of this information could be scored in space the size of a desk, on microfilm, microfiche, or computer media.

¶ 54 It is undisputed that, when the Campbells filed suit in 1989 and immediately filed document production requests for all claim-handling manuals in effect at the time the claims against Curtis Campbell were adjusted, none of this information was provided them. Instead, State Farm provided the

Campbells only with copies of the subsequent, then-current manuals that were in its local Utah offices, asserting that its earlier manuals were no longer available.

¶ 55 The record also reflects that, shortly thereafter – while this case and others alleging bad faith claim handling remained pending and subject to outstanding discovery requests – State Farm launched elaborate efforts to destroy its existing corporate memory on its past claim-handling practices, with the explicit purpose of keeping them from discovery in bad-faith cases. Through documents retained by Samantha Bird when she left State Farm, as well as Ms. Bird's own testimony, it was established that on April 5, 1990, while this case was pending, Janet Cammack, an in-house attorney sent by top State Farm management, conducted a meeting here in Utah during which she instructed Utah claims management to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past – in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents. These orders were followed even though at least one meeting participant, Paul Short, was personally aware that these kinds of materials had been requested by the Campbells in this very case.

¶ 56 In the meeting, Cammack stated that not even corporate headquarters would retain copies of these materials. Consistent with that evidence, State Farm concedes that it has destroyed every single copy of the old claim-handling manuals that it had on file in its historical unit in 1988, even though these documents could have been maintained at minimal expense. In a parallel effort, in 1995 State Farm sent letters to its more than 2,000 current or former outside law firms directing them to destroy or return immediately every copy of a wide range of potentially damaging documents. Further, Fye provided testimony regarding a number of instances in which

a plaintiff obtained access to State Farm documents subject to a protective order or confidentiality agreement; the cases were settled so that the documents did not become public at trial; the documents were returned pursuant to the settlement agreement; and then, when other plaintiffs requested these documents, State Farm responded that it did not have them.

¶ 57 As a final, related tactic to minimize the amount of information concerning its claim-handling practices available to those scrutinizing the company, in recent years State Farm has gone to extraordinary lengths to stop damaging documents from being created in the first place. As Fye and Prater testified, State Farm takes a highly aberrant approach – inconsistent with the sound principles of corporate management and records control set out in the testimony of State Farm's own expert – of keeping no records at all on excess verdicts in third-party cases, or on bad-faith claims made against State Farm or verdicts (including punitive damages verdicts) assessed against State Farm. (State Farm claims that it has no record of its punitive damage payments, even though such payments must be reported to the IRS and in some states may not be used to justify rate increases.) State Farm contends that it has in place no mechanism for even alerting top executives to such developments on a current basis. Indeed, regional vice president Buck Moskalski testified that he would not report a punitive damage verdict in this case to higher management, as such reporting was not set out as part of State Farm's management practices. This evidence strongly supports the inference that efforts by top executives to cultivate willful blindness to the effects of State Farm's corporate policies are consciously designed: (1) to deprive victims of State Farm's misconduct of information useful to proving a pattern or practice of wronddoing, and (2) to give top management plausible deniability, making it easier for them to depict instances of wrongdoing as simply reflecting an isolated, "honest mistake."

¶ 58 ***c. Systematic manipulation of individual claim files to conceal claim mishandling.*** The record also contains ample evidence that State Farm has long directed its claim adjusters to systematically "sanitize" or otherwise manipulate individual claim files to provide a false, innocent picture of how the claim was handled, in an effort to minimize exposure to later lawsuits alleging bad-faith claim handling. Fye and Prater provided numerous examples of this practice and pointed to official company documents (most of which State Farm once believed it had successfully destroyed) indicating that this practice reflects a long standing philosophy among State Farm management. Examples of this practice in action were also provided by Bruce Davis and Ina DeLong, who gave detailed testimony on how they were required systematically to improperly rewrite documents detailing and manipulating claim files and maintain important information on temporary "buck slips" or "post-it" notes, to be removed later, and of how their superiors routinely engaged in successive "purges" of any negative information that might remain in a file, prior to it being handed over to opposing attorneys in discovery.

¶ 59 A State Farm document entitled the "Excess Liability Handbook," written before the Campbell accident, contains detailed instructions on the padding and sanitizing of claim files in cases with exposure above the policy limits. Portions of this Handbook provide evidence supporting the conclusion that State Farm viewed the practice of taking a hard line and gambling in "excess cases" (when applied to many cases) as an effective method for reducing claim payments, thus enhancing corporate profits. This Handbook also contains evidence that State Farm recognized the need to conceal that it was making conscious decisions to subject its insureds to the risk of excess verdicts. Accordingly, the Handbook has instructions on padding the file with "self-serving" documents, as well as

instructions to leave certain critical items out of files, such as evaluations of the insured's exposure. Such instructions clearly required manipulation of files to conceal State Farm's misconduct in excess cases and to make it very difficult for an insured who is victimized by an excess verdict to ever hold State Farm accountable. Expert witness Fye testified that the Campbell case was a classic example of State Farm's application of the improper practices taught in the Excess Liability Handbook.

¶ 60 ***d. Systematic manipulation of testimony by employees.*** The record contains substantial evidence that State Farm has long had a corporate policy, in defending against cases alleging bad-faith claim handling, of aggressively "coaching" its employees to ensure that their testimony will be favorable to the company and that opposing attorneys will be hindered in their ability to obtain relevant, non-privileged information from such witnesses. The Campbells presented direct evidence of such a practice in the form of transcripts of videotapes of a company-wide claims management conference at which State Farm's claim-handling supervisors were told that they should anticipate being potential witnesses for the company in bad-faith litigation. The supervisors were taught that in courtrooms, "truth is illusory" how, through extensive coaching, a memory can be "created" for a company witness; and how, by repeating questions and prepared answers "numerous times." State Farm attorneys and witnesses can work together to "totally frustrate" the efforts of opposing attorneys.

¶ 61 ***e. Systematic efforts to intimidate opposing claimants, witnesses and attorneys.*** Finally, the evidence in this case supports the conclusion that State Farm has a regular practice of working to wear down and outlast plaintiffs and opposing attorneys in lawsuits seeking to punish it for bad-faith claim handling, by using a variety of tactics to intimidate claimants, witnesses and attorneys who oppose it.

¶ 62 Regarding the intimidation of claimants, there is evidence in the record of State farm's training of its representatives to intimidate claimants who charge it with bad-faith claim handling. State Farm's publication on "Extra Contractual Lawsuits," which was in use by 1979, instructs its outside attorneys to "ask personal questions" as part of an examination under oath of a claimant, for the apparent purpose of deterring the claimant from continuing with the process, out of a fear of embarrassment.

> Most of us consider our income, our debts, our domestic problems, how we spend our money, whether we are keeping another woman, and things of this nature to be very personal. We don't like other people asking us questions about these things, and, under normal circumstances, we don't go around asking other people these questions. However, . . . where a punitive damage count is in a lawsuit, these matters become extremely important to the successful defense of that claim.
>
> If the insured is paying the expenses of keeping some woman in an apartment, that may be extremely personal business, especially if he is married, but if he . . . charges that we are guilty of conduct for which we should be punished, it is also our business.

PX-121, "Extra Contractual Damage Claims: What They Are, and How to Handle Them," at 10-11. Although this document is nearly two decades old, Gary Fye testified in 1996, based on his current knowledge of State Farm's practices, that "this accurately represents the attitude toward [him] and others involved" with bad faith litigation against State Farm. 12 Tr. 69. State Farm's official training manual focuses on the use of

such personal matters, in the settlement of all claims, from the beginning. It lists subjects such as "infidelity" that can be used against a claimant on a claim that is "under direct negotiation." Article 11 Claim Superintendents' Manual (April 1971); PX-57(2) Tab 9 Trial pages 382-384. Adjuster Ray Summers testified that a common tactic of State Farm was that of "unjustly attacking the character, reputation and credibility of a claimant and making notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury." 12 Tr. 217. In fact, Bob Noxon sought to use this tactic in the Campbell case, instructing Summers to write in the file that Todd Ospital (who was killed in the accident) was speeding because he was on his way to see a pregnant girlfriend. There was no pregnant girlfriend. Expert testimony established that using such tactics as part of the insurance adjustment process is completely improper. *See* 17 Tr. 153 (Prater).

¶ 63 State Farm uses similar tactics in an attempt to intimidate witnesses from opposing it in bad-faith litigation. Former long-term State Farm employee Ina DeLong has given testimony critical of State Farm in a number of cases, and testified that she has "personally been the subject of some of this kind of conduct by State Farm." 14 Tr. 116 and 207-08. State Farm has conducted an "extensive" investigation of DeLong's personal life, including her sex life (to the point of paying a maid at a hotel to reveal whether or not DeLong was having overnight guests), compiling an 88-page dossier on her. 14 Tr. 207-08. State Farm has assigned an attorney to "shadow" her in bad faith cases where she appears and to essentially harass her with unnecessarily repetitive depositions. 14 Tr. 214-15. DeLong testified:

> [T]hey frequently run from three to five days, where we go over the same things, the same allegations, the same unpleasantness. They're usually videoed, frequently with in excess of two or three flood lamps, for seven and eight hours at a time.

14 Tr. 214-5

¶ 64 Gary Fye has experienced similar harassment at the, hands of State Farm for his work over more than a decade to preserve copies of key documents on State Farm's internal practices. 12 Tr. 69-70.

¶ 65 Finally, with respect to the intimidation of attorneys who might be in a position to bring contingent-fee litigation against State Farm on behalf of victims who have few resources, the record reveals that State Farm has a practice of resorting to what one of its consultants (as part of the official training process) approvingly referred to as "mad dog defense tactics." At a national conference, approximately 200 of State Farm's divisional claims superintendents were instructed that "we keep plaintiffs tied up in law and motion for months. Now that's the old mad dog defense tactic, but it works." 17 Tr. 705. Expert witness Steve Prater testified to State Farm's methods for exploiting its superior resources to wear out opposing attorneys with unending, vexatious and expensive litigation tactics. According to Prater, State Farm focuses on making the litigation process as time-consuming, expensive and prolonged as possible by, for example, making meritless objections; claiming false privileges; and destroying documents or claiming that they don't exist or would be too expensive to retrieve. 17 Tr. 163-64, 168-74.

¶ 66 The result of such tactics, Prater testified, was that many lawyers get worn down and capitulate, rather than continuing the litigation, so that it is extremely difficult to continue with the litigation long enough to develop a complete factual record and reach trial. Gary Fye also provided expert

testimony on these "mad dog" litigation tactics, concluding that State Farm's use of them is "extremely profitable," even in light of the cost involved for an individual case, because of their *in terrorem* value across a wide range of cases in intimidating claimants and attorneys into not filing lawsuits at all, or settling claims for small amounts of money rather than endure the financial drain of litigation in the face of such abusive tactics. 5 Tr. 114. (For example, by destroying or hiding the 1979 PP&R manual, State Farm has been able to keep any other court from considering this critical document. 12 Tr. 90-91 (Fye). Plaintiffs obtained it by subpoena from former State Farm employee John Crowe, who resides in Utah. It has been requested in other cases, but has never been produced. *Id.*) Indeed, Fye had never seen a case in which the plaintiffs' attorneys had managed to reach the advanced stage reached in this case. 12 Tr. 46.

¶ 67 *iii. The impact of these profit and evasion schemes with respect to the Campbells specifically.* The evidence established that prior to the 1981 accident involving Curtis Campbell, State Farm conceived and implemented the wrongful profit and evasion schemes described above. These schemes have permeated all, aspects of its claim-handling practices; including its mistreatment of consumers on both third-party and first party insurance claims. Fraud and deception are inherent parts of the success and profitability of these schemes. As these schemes were applied in the Campbells' case, State Farm was able to engage in a gamble in which the Campbells (unwittingly) had all the downside risk and State Farm had all the potential upside gain.

¶ 68 This case is a clear example of how State Farm applies its profit and evasion schemes. Nevertheless, State Farm has argued at length that the evidence about State Farm's unlawful profit scheme of giving undisclosed incentives to adjusters to

underpay amounts owed to consumers on claims, and its related evasion scheme of using various unlawful and unethical tactics to escape any punishment for its profit scheme, is irrelevant to this case, and cannot be taken into account in setting punitive damages, because the Campbells assertedly were not injured as a result of these policies and practices. State Farm claims that, because (in hindsight) it seems foolish for Bill Brown and other managers in Utah not to have settled the litigation against Curtis Campbell, but instead to take it to trial, and because State Farm ultimately ended up paying out much more than the policy limits on the case, what happened to the Campbells cannot be viewed as part of any unlawful profit scheme being run by State Farm. The key contention for State Farm is that it did not, in fact, profit from what happened to the Campbells. In making these claims, State Farm ignores both the proper perspective on the PP&R program and specific evidence in the record.

¶ 69 The record fully supports the conclusion that the bad-faith claim handling that exposed the Campbells to an excess verdict in 1983, and resulted in severe damages to them, was a product of the unlawful profit scheme that had been put in place by top management at State Farm years earlier. The Campbells presented substantial evidence showing how State Farm's improper insistence on claims-handling employees' reducing their claim payouts during the coming year, regardless of the merits of each claim, manifested itself under the PP&R program in the Utah claims operations during the period when the decisions were made not to offer to settle the Campbell case for the $50,000 policy limits – indeed, not to make any offer to settle at a lower amount. This evidence established that high-level manager Bill Brown was under heavy pressure from the PP&R scheme to control indemnity payouts during the time period in question. In particular, when Brown declined to pay the excess verdict against Curtis Campbell, or even post a

bond, he had a special need to keep his year-end numbers down, since the State Farm incentive scheme meant that keeping those numbers down was important to helping Brown get a much-desired transfer to Colorado.

¶ 70 The Excess Liability Handbook (which Brown apparently kept in his office and used to train subordinates, as Samantha Bird's testimony indicated), contains evidence supporting the conclusion that State Farm viewed taking a hard line in "excess cases," both before and after trial, to be an effective method for reducing indemnity payments. There was ample evidence that the concepts taught in the Excess Liability Handbook, including the dishonest alteration and manipulation of claim files and the policy against posting any supersedeas bond for the full amount of an excess verdict, were dutifully carried out in this case.

¶ 71 Under the PP&R scheme, the actions taken by Brown and his subordinates with respect to the claims against Curtis Campbell appear to be textbook examples of the sort of behavior that is predictably rewarded by State farm under the PP&R program. There was ample basis for the jury to find that everything that happened to the Campbells – when State Farm repeatedly refused in bad-faith to settle for the $50,000 policy limits and went to trial, and then failed to pay the "excess" verdict, or at least post a bond, after trial – was a direct application of State Farm's overall profit scheme, operating through Brown and others.

¶ 72 State Farm's main response to the Campbells' explanation of how the *Campbell* bad-faith claim handling was, in fact, an application of State Farm's unlawful profit scheme, is to call this an "irrational thesis," stating that it does not explain "why State Farm would adopt a corporate policy of wasting money by trying no-brainer cases." State Farm Surreply Brief at 28-

29. Again, however, the essence of State Farm's claims-handling profit scheme was its disciplined insistence on having claims adjusters and employees work on a systematized basis to meet arbitrary, preset targets, one year at a time – and then, if that strategy yields an occasional setback threatening to take money out of the corporate coffers (through a lawsuit alleging bad faith), relying on a panoply of techniques for bullying the complaining victim into backing down rather than doing to State Farm what apparently only the Campbells, in the history of bad-faith litigation against State Farm, have managed to do: get to a jury on a punitive damages claim, armed with a reasonably complete factual record concerning the nature of State Farm's unlawful policies and practices.

¶ 73 The fact that this PP&R scheme will, in isolated cases, sometimes cost State Farm money, compared with what would have happened in that isolated case if fair value had been promptly paid, is obvious but irrelevant for present purposes. The PP&R policy is crafted to increase corporate profits across a broad range of claims on a yearly basis. Pursuing a PP&R policy such as State Farm's can be perfectly rational, from a profit-maximizing perspective, even at the price of an occasional setback. State Farm's complaints about the "bizarreness" of the Campbells' argument, see State Farm Reply Br. at 28 n.13, if accepted, would logically entail, for example, the conclusion that any investment strategy that doesn't invariably make one's stock or bond portfolio go up in value on every investment is "irrational" or "bizarre." That perspective makes no sense. What happened to the Campbells was just one more casualty of State Farm's overall approach toward claim handling, so that State Farm's argument on this point is without merit.

¶ 74 State Farm also suggests, much more briefly, that the evidence concerning State Farm's evasion tactics also has little

or nothing to do with the Campbells or with the proper amount of punitive damages in this case. Apart from the fact that consideration of this evidence, which goes to State Farm's perception of the likelihood that it would ever be punished for his wrongdoing, is essential in considering the proper amount of punishment to be assessed in the rare case that emerges and goes to trial (as set forth in the Campbells' memoranda and below), the record also shows that a variety of evasion tactics were used by State Farm, through Summers, Brown, Noxon and others, in an effort to conceal its wrongdoing toward the Campbells and evade any punishment in connection with that wrongdoing.

¶ 75 Given all this, the Campbells' institutional case, outlining the broader corporate policies that produced both the injuries that the Campbells suffered and the efforts of State Farm employees to minimize the possibility of punishment, was properly considered in setting the appropriate amount of punitive damages.

¶ 76 *iv. Other findings regarding the nature of State Farm's misconduct.* The Court listened to the evidence and carefully evaluated the credibility of the witnesses called by both sides; and believes that the jury reasonably concluded from the evidence that the above summarized policies and practices do in fact exist at State Farm, and were in fact responsible for the injuries suffered by the Campbells. Further, the Court believes from the evidence that these policies have been followed at State Farm for the past two decades and that the means used to implement the policies are highly reprehensible. Those means certainly qualify under many of the factors referred to in *BMW v. Gore* as being egregious – they are callous, clandestine, fraudulent, and dishonest.

¶ 77 Beyond the fact that State Farm's misconduct bears the characteristics of especially reprehensible behavior set out in *Gore*, it is the sort of misconduct that the Utah Supreme Court condemned in *Crookston*. There, the Court noted that "[f]rom the evidence presented at trial, the court could reasonably conclude that Fire Insurance conducted what amounted to a conscious policy of fraudulently denying its customers the benefits of their contracts." *Crookston II*, 860 P.2d at 941. In this case, unlike in *Crookston*, the jury was presented with direct evidence, in the form of internal company documents, admissions from a number of current or former employees, and expert witnesses, from which it could reasonably find that precisely such a scheme has been pursued, and over a lengthy period of time.

¶ 78 Further, *Crookston* continued:

> It could be inferred that Fire Insurance's motive for engaging in such conduct was to substantially increase its profits. Depriving a company of the benefits of such a course of conduct and deterring it from acting in this fashion in the future may warrant an award of punitive damages that far exceeds the ratios that we have previously found reasonable. If a company could predict that its systematic fraudulent conduct would evade detection in many instances and on those few occasions where it was discovered, would never result in punitive damages greater than the ratios we have historically upheld, it could carefully calculate the cost/benefit ratio of its wrongful conduct and avoid the deterrent potential of punitive damages. Frustrating this sort of calculus was one of the reasons we gave in *Crookston I* against adopting rigid dollar amounts or ratio ceilings on punitive damage awards.

Id. at 941 (citing *Crookston I*, 817 P.2d at 809). This analysis fully applies here.

¶ 79 Earlier in the opinion, the Court approved of certain analysis of the trial judge in *Crookston* that also seems highly pertinent here:

> The [trial] court stated that the conduct at issue was done with the sole apparent purpose of enabling the insurance company to avoid paying out sums legitimately owed to the Crookstons. This conduct, the court said, demonstrated the company's "calculated and calloused attitude" toward settling valid claims . . . . Given the large volume of claims handled annually, Fire Insurance's vast financial resources, and management's active endorsement of the fraudulent conduct, the court deduced that this sort of practice would be widely engaged in unless devastatingly punished. "One may never know how many of the thousands of claims handled in Utah and elsewhere by Fire Insurance have been subjected to the same kind of fraudulent manipulation as occurred in this case. . . ."

Id. (quoting trial judge decision).

¶ 80 The evidence on the scale of the fraud and the need for devastating punishment is far more extensive in this case than in *Crookston*. State Farm has sold as its product "peace of mind", using an advertising slogan which promises that consumers can count on it to act "like a good neighbor." But as the trial proceeded, it became a matter of plain evidence that State Farm's corporate policies involve betraying the trust that it invites its policyholders to place in it, the trust that it has a fiduciary duty to uphold. The jury could easily find from the evidence that State Farm's claim-handling practices are predicated on exploiting the trust placed in it by its policyholders, and the Court so finds in making its own analysis of the proper amount of punitive damages in this case. In sum, in light of all the above considerations and the other points made by the Campbells in their memoranda and oral argument, the reprehensibility of State Farm's policies and practices, both generally and as they were applied to the Campbells, strongly supports a jury award of massive punitive damages.

c. Facts and Circumstances Surrounding State Farm's Misconduct

¶ 81 As to this factor, the Court simply refers to the facts that the Court has already commented on in determining the proper amount of compensatory damages for the Campbells, and the facts just discussed concerning the reprehensibility of State Farm's corporate policies designed to betray the trust placed in it by its policyholders and evade punishment for that wrongdoing. The Court believes that those facts speak for themselves with respect to the type of insensitive and callous behavior exhibited by State Farm toward consumers, clearly justifying a large punitive damages award.

d. Effect of State Farm's Misconduct on the Lives of the Campbells and Others

¶ 82 The Court has already dealt in other orders with the effects of State Farm's misconduct on the Campbells. As to the lives of others, it seems to the Court, as the Campbells have detailed at length, that the very nature of State Farm's policies, and the tactics it uses to evade the imposition of punitive damages, make its misconduct extremely hard to detect and punish. The Court shares the view that the evidence demonstrates, as argued by the Campbells' counsel, that often the harm is minor to the individual but massive in the aggregate. The scheme, it seems to the Court, is pernicious. Not only does

it injure large numbers of insureds, but it has the effect of corrupting employees (not that any employee wrongfully adjusts every claim, or that every employee wrongfully adjusts claims on a regular basis). It appears to the Court that under State Farm's scheme, a considerable percentage of policyholders is victimized by a wrongful denial of benefits, oftentimes when these policyholders are the most vulnerable. And it certainly appears to the Court that State Farm pursues an official corporate policy established to encourage such wrongful denial of benefits in situations where State Farm believes that it can be successfully accomplished.

¶ 83 Another effect of State Farm's policies is that it puts auto insurance companies who play by the rules at a competitive disadvantage, allowing State Farm to increase its market share or its profits (whichever it is putting the emphasis on), or a combination of both, by having an advantage that honest companies don't have: the shortchanging of policyholders on claim amounts that should be paid. As the Campbells demonstrated with expert testimony, this inevitably creates pressure on the honest companies to resort to the same sort of misconduct in an attempt to stay even with State Farm, extending the damage to consumers throughout the auto insurance marketplace as a whole.

e. Probability of Future Recurrence of State Farm's Misconduct

¶ 84 The Court has already found that State Farm has carried out a persistent scheme of wrongful conduct. It would appear to have been extremely profitable, as the Campbells' experts on the insurance industry testified, and as various examples of the scheme in practice strongly support. Further, despite testimony from State Farm witnesses that the improper payout goals at the core of the scheme was assertedly

"obsoleted" in 1992 (and again in 1994), the Campbells presented ample evidence that this incentive system (including its improper goals) – the engine that pressures adjusters to wrongfully deny benefits to consumers on a wide range of claims – remains in operation today. Only the documentation has changed, for appearances sake; as the Campbells proved with both internal company documents and through testimony of knowledgeable witnesses, the scheme is now carried out verbally, to avoid the creation of documents that might be damaging to the company in litigation.

¶ 85 To be sure, there was testimony from regional vice president Moskalski during Phase II that he had ordered employees in Utah and the two other States he oversees to start sending "peace of mind" letters to consumers in third-party liability situations like the one faced by the Campbells (i.e., letters to its insureds who have been sued in a third-party action, informing them that if State Farm decides to take the case to trial, State Farm will protect the insured against any personal exposure, so long as an offer has been made to settle within the policy limits and so long as the insured cooperates in the defense of the case). But it is worth noting that other than Mosklaski's self-serving testimony there was no evidence presented to the jury that either Mosklaski or corporate headquarters has promulgated such a policy. There was no evidence that Mr. Moskalski did anything in writing, or in consultation with business lawyers. As the Court understands it, Mr. Moskalski was in the office of trial counsel preparing for his trial testimony and it was at that point, not long before the jury was to decide punitive damages, that Mr. Moskalski experienced a moment of enlightenment and, he testified, decided to adopt this new policy. That was the time and place when this change assertedly came into existence.

¶ 86 The Court does not find it surprising that the jury apparently was not particularly persuaded that this repentance was genuine. And to suggest that it was a "deathbed repentance," as did the Campbells' counsel in closing argument, seems if anything an understatement of the circumstances concerning this purported change. This testimony is just one example of the implausible nature of much of the testimony elicited from State Farm's employees in this case. State Farm's unrepentant attitude was evidenced throughout the trial, during which witness after witness testified to being "proud" of how State Farm had handled the claims against Curtis Campbell, and refused to admit any flaws, ever, of any kind in any of State Farm's past or present claim-handling policies – or that even a single claimant had ever been treated unfairly during State Farm's entire existence – despite the documentation to the contrary drawn from State Farm's own files. Given the absence of credible evidence that, in fact, State Farm's policies have changed, and that the misconduct carried out toward Utah consumers during the past two decades has ended, the probability of recurrence of State Farm's misconduct appears extremely high.

f. Relationship of the Parties

¶ 87 The relationship of the parties, is fiduciary in nature. As noted in the Utah Court of Appeals decision in this case:

> This higher duty is imposed on the insurer because in a third-party situation, the insurer "controls the disposition of the claims against its insured, who relinquishes any right to negotiate on his own behalf." The insured is thus "wholly dependent" on the insurer to see that the insureds' interests are protected. . . . The insurance contract thus "creates a fiduciary relationship because of the trust and reliance placed in the insurer by the insured."

Campbell v. State Farm, 840 P.2d 130, 138 (Utah App. 1992).

¶ 88 Indeed, State Farm spends large sums each year advertising the "peace of mind" that it promises its customers, so there is little credibility to the claim that customers should not be expected to rely on a company such as State Farm to fairly carry out its fiduciary duties and to resist the temptation to betray insureds in the pursuit of easy profits. As late Chief Justice (then Judge) Burger recognized many years ago, "[p]unitive damages are particularly apt" where the trust put in a fiduciary "is intentionally and consciously disregarded, and exploited for unwarranted gain." *Brown v. Coates*, 253 F.2d 36, 40 (D.C. Cir. 1958). That trust was plainly abused in this case, and was abused pursuant to what the Court believes was a conscious policy to do so on a regular basis to a wide range of insureds. In the Court's mind, this is another very substantial basis supporting the jury's award of punitive damages.

g. Amount of Actual Damages Awarded

¶ 89 The Court is of the opinion that it should issue a remittitur reducing the amount of punitive damages to $25 million on the basis of the seventh and final *Crookston* factor, "the amount of actual damages awarded," *Crookston I*, 817 P.2d at 808, which the Utah Supreme Court has held triggers certain presumptions based on the ratio between the punitive damages and actual damages. *Id.* at 810-12.

¶ 90 As the Court has indicated, the ratio factor is the sole reason for the remittitur.

¶ 91 As with the compensatory damages award, as remitted, post-judgement interest should run on this remitted punitive damages award from the date of the original judgment, August 8, 1996.

¶ 92 The Court acknowledges that the denominator of this 25-to-1 ratio – the $1 million in compensatory damages, as remitted by this Court and accepted by the Campbells – may be viewed as artificially low in that it does not capture the full amount of harm done to the Campbells as a result of State Farm's misconduct. For example, as a result of State Farm's bad-faith failure promptly to settle the claims against Curtis Campbell for the $50,000 policy limits, the judgment against Curtis Campbell following the exhaustion of all appeals in 1989, was $264,287. Arguably, at least that amount should be added to the denominator in the calculation of the punitive/compensatory ratio. Any contrary approach, it could be argued, would leave a defendant free to engage in a course of intentional wrongdoing for years, pay up the compensatory damages just before trial, and by that means avoid the imposition of punitive damages assessed in proportion to the total history of wrongdoing. If this argument were adopted, the remitted $25 million punitive damages award would bear a ratio of approximately 19.8 to 1 ($25 million divided by $1,264,287).

3. Analysis Under *BMW v. Gore*

¶ 93 The framework set forth in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), for assessing federal substantive due process calls for analysis of three "guideposts": (1) the degree of reprehensibility of the defendant's conduct, 116 S. Ct. at 1599; (2) the ratio of punitive to actual damages, *id.* at 1601; and (3) the civil and criminal penalties that could be imposed for comparable misconduct. *Id.* at 1603.

¶ 94 With respect to reprehensibility, as already discussed, State Farm's high-level corporate scheme implicates virtually

all the hallmarks of reprehensibility noted in *Gore* and must be regarded as deeply reprehensible.

¶ 95 With respect to the punitive/compensatory ratio, the U.S. Supreme Court has indicated that, for purposes of federal constitutional analysis, the ratio between punitive and compensatory damages does not impose a rigid cap on punitive damages awards, and that large ratios are acceptable if a rational explanation for a given award exists. Thus in *Gore*, the Court went out of its way to reject any "categorical approach" – any "notion that the constitutional line is marked by a simple mathematical formula." *Id.* at 1602. The Court added that high ratios may be justifiable "in cases in which the injury is hard to detect," while recognizing that ratios in range of 500 to 1 should understandably trigger closer judicial scrutiny. *Id.* at 1602-03. Because at least several independent rational explanations exist in support of the punitive damage award in this case, *Gore's* ratio guidepost does not require reduction of the award based on a federal substantive due process analysis.

¶ 96 The final *Gore* guidepost, "the civil or criminal penalties that *could* be imposed for comparable misconduct," 116 S. Ct. at 1603 (emphasis added), does not require reduction of the punitive damage award. The penalties that could be imposed under Utah law for the fraudulent scheme that has been pursued by State Farm are enormous. Under the Unfair Claims Practices Act, Utah Code Ann. §§ 31A-26-301, *et seq.*, State Farm could be fined $10,000 for each fraud committed on a Utah consumer.

¶ 97 Even more fundamentally, looking beyond the cumulative statutory fines that could be imposed in Utah based on thousands of individual instances of wrongfully denying benefits owed on claims, much greater penalties could be imposed based on the evidence of State Farm's broad pattern of

consumer fraud in Utah: (1) State Farm's operations in Utah could be dissolved, or its license to operate suspended, *see* Utah Code Ann. §§ 31A-26-213, 76-3-201(2) & (3), 76-10-1602(ppp). and 76-10-1603.5(5); (2) State Farm's officers responsible for the fraudulent scheme could be imprisoned, or at least removed for up to five years, *see* Utah Code Ann. § 76-3-303 (*Gore* noted that it is especially important, in considering comparable penalties, whether imprisonment is authorized in the criminal context); (3) State Farm could be forced to disgorge all the illicit profits from the entire scheme, plus be fined twice those illicit profits as a penalty, *see* Utah Code Ann. §§ 76-10-1602, *et seq.*; and (4) State Farm could be forced to publicize the fact that it and/or its officers had been criminally convicted of fraud, *see* Utah Code Ann. § 76-3-303, with obviously devastating effects on its business nationwide.

¶ 98 Certainly, the Court does not believe that the statutory and regulatory sanctions that could be brought against State Farm under Utah law are minimal, nor does the fact that these sanctions have to date not been pursued by the regulatory and prosecutorial authorities support the claim that the remitted amount of punitive damages is excessive. State Farm places considerable emphasis on the argument that the analysis should concern not the civil and criminal penalties that it *could* be subjected to under existing Utah law, but instead what penalties are *likely* as a practical matter, given past enforcement practices. But in *Gore*, the Supreme Court plainly indicated that the focus, in terms of assessing whether a wrongdoer has adequate prior notice of the scale of penalty that a given course of misconduct could trigger, is properly directed to "the civil or criminal penalties that *could* be imposed for comparable misconduct." 116 S. Ct. at 1603 (emphasis added). For example, the U.S. Court of Appeals for the D.C. Circuit recently applied this aspect of *Gore* in upholding against a federal excessiveness attack a $37 million penalty assessed

against a person who, for many years, had failed to disclose information about the control of a bank that was required to be disclosed under federal banking laws. *Pharaon v. Board of Governors of the Federal Reserve*, 135 F.3d 148, 156 (D.C. Cir. 1998), *petition for cert. filed*, July 15, 1998. The D.C. Circuit relied on the penalty that theoretically could be assessed under the relevant statute (1.2 U.S.C. § 1847(b)) – 8299 days of nondisclosure, at $25,000 per day for most of the period, and $1,000 a day for the remainder of the period, for a total of $111.5 million – without any showing that such maximum penalties had ever been assessed in the past, and without any contemporaneous explanation of why the regulators had picked the particular sum of $37 million as a penalty. *Id.* at 151-52, 156-57. If anything, the absence of any such aid from these authorities is a basis for enlarging the permissible punitive damages because of the seriousness and difficulty of parties such as the Campbells and their counsel, unassisted, taking a case of this nature all the way to trial. It requires the will of a David against a Goliath, or of a Rocky Balboa against an Apollo Creed, to stay the course and bring litigation such as this to the point where it rests today.

D. Motion for New Trial Based on Claim of "Passion or Prejudice"

¶ 99 State Farm's final argument on punitive damages is that, if this Court concludes that the jury's $145 million award is excessive, it must grant a new trial, as the excessiveness of the verdict can only be explained as the product of a flawed trial process that created an atmosphere of passion and prejudice. As part of this argument, State Farm points to several statements by the Campbells' counsel in closing argument (never objected to), which State Farm asserts inflamed the jury into disregarding its fact-finding function, and it suggests that the jury was not serious in its deliberations. Here, State Farm

also reiterates its objections to the jury's post-trial conduct. *See* State Farm Opening Memorandum at 112-17.

¶ 100 As already indicated by this Court in separately filed orders, there is no basis for such claims. This was a well-educated jury that was extraordinarily attentive during the trial and that discharged its duty with the utmost seriousness. The jurors sacrificed most of their summer plans, and suffered through considerable delays beyond the planned trial period, serving without complaint over a two-month period. The Campbells' counsel, while providing vigorous representation of their clients – matched equally by energetic and dedicated counsel for State Farm – made no effort to inflame the jury. The trial was pervaded by an overall atmosphere of fairness, with a focus on the evidence relevant to the issues rather than on appeals to emotion.

¶ 101 The fairness of the proceedings is confirmed by the fact that State Farm's highly competent trial counsel saw no need to raise the present objections to the comments of the Campbells' counsel while the trial was in progress. There is every indication that the jury deliberated carefully, as illustrated by its three separate requests to examine various pieces of evidence in the case; there is no evidence that the jury was in any way careless in the discharge of its duties. Further, the Court has issued a remittitur reducing the punitive damages award by roughly 80 percent not because of any flaw in the jury or the trial process, and not because the jury's verdict was irrational as rendered based on the evidence that the jury considered, but based on the ratio factor of *Crookston*, in light of which the Court concludes that a 25-to-1 ratio is appropriate.

II.

STATE FARM'S CLAIM OF ERROR ON THE SCOPE OF EVIDENCE

¶ 102 As part of its post-trial motions, State Farm takes the position that the evidence should have been narrowly limited to its specific treatment of the Campbells and that the wide range of evidence tending to establish that the mistreatment of the Campbells was part of a broader scheme – the evidence on State Farm's general practices, policies or patterns (including specific illustrative or corroborative examples) – should have been excluded. Because the foregoing summary of the evidence justifying the punitive damages necessarily required an extensive discussion of the types of evidence that State Farm contends should have been excluded, the Court believes that this is an appropriate place to address State Farm's claim of error with respect to this Court's rulings concerning the scope of Phase I evidence.

A. State Farm's Position Misconstrues the Rules of Evidence

¶ 103 Rule 402 provides that "all relevant evidence is admissible unless it is excluded by a specific rule or law." Rule 401 gives a very broad definition of relevant evidence:

> "Relevant evidence" means any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The evidence admitted at trial concerning State Farm's improper claim-handling schemes – its improper practices, policies and patterns, including specific corroborative examples

– clearly meets the threshold standard for admissibility set by Rules 401 and 402. As supported by Edward L. Kimball and Ronald N. Boyce in *Utah Evidence Law* § 4-2 (1996), the application of Rules 401 and 402 here involves simple logic. Phase II of the trial (which followed findings of bad faith against State Farm by the jury in Phase I) involved the Campbells' claims of fraud, intentional infliction of emotional distress, punitive damages, and agency issues, along with State Farm's central assertion that the mistreatment of the Campbells was unintentional and simply the result of honest mistakes. Phase II involved, in particular, State Farm's insistence that it had no motive to decline a reasonable opportunity to settle the claims against Mr. Campbell or to intentionally mislead the Campbells concerning their excess exposure (to get them to acquiesce in State Farm's decision to gamble on a trial). State Farm contended, among other things, that it had no motivation to act contrary to the Campbells' best interests, and that the testimony of its former employee Ray Summers was not credible because State Farm had no motivation to act as Summers contended it had.

¶ 104 In order to prevail in Phase I of the trial, concerning the threshold issue of bad-faith claim handling, the Campbells did not have to prove intent, motive, absence of mistake, or the like. These subjects, however were critical to Phase II of the trial, on the Campbells' claims of fraud, intentional infliction of emotional damages, punitive damages, and agency. Furthermore, as discussed in detail under Part I above, such evidence bears directly on several of the seven factors that the *Crookston* decisions require be considered in the assessment of punitive damages.

¶ 105 Accordingly, it was apparent to this Court in making its pretrial decisions concerning the admissibility of the so-called "other acts" evidence that the jury's consideration of

this evidence in Phase II was not only necessary, but essential and strongly probative of several material issues lying at the heart of this controversy. The evidence in question met the Rule 401 and 402 relevancy standards, making it admissible unless excluded by another provision of law. State Farm claims that Rule 404(b) required exclusion.

¶ 106 Rule 404(b) provides:

> **(b) Other crimes, wrongs or acts**. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for *other purposes*, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (emphasis added)

¶ 107 Inasmuch as the evidence in question was neither offered nor admitted for a prohibited purpose, but solely for proper "other purposes" expressly recognized by Rule 404(b), the Court finds, as it has in the past, that Rule 404(b) did not require the exclusion of such evidence. (As noted in *State v. Doporto*, 935 P.2d 484, 490 n.4 (Utah 1997), the "other purposes" categories listed in the last sentence of Rule 404(b) are not exclusive. *See also Utah Evidence Law*, *supra*, § 4-41).

¶ 108 In its Rule 404(b) argument, State Farm urges that the only evidence that was properly admissible in Phase II was evidence relating to the details of how the *Campbell* file was handled. Thus, State Farm insists, any broader evidence pointing to fault in its institutional claim-handling policies can only be viewed as evidence of "bad character," inviting the very sort of inference prohibited by Rule 404(b). Specifically, State Farm complains, "plaintiffs' trial counsel . . . invited the jury to draw from this evidence precisely the inference that Rule

404(b) forbids – that State Farm must have committed an act of bad faith in the present case because it has done so in so many other cases." State Farm Reply Memorandum at 27-28. In a related point, State Farm argues that the danger that this so-called "other acts" evidence would unfairly influence the jury's determination of bad faith was so great as to violate Rule 403, thus requiring a new trial on this ground as well. *See* State Farm Opening Memorandum, at 56-58.

¶ 109 The central problem with these arguments is that the question of whether State Farm acted in bad faith was decided by the first jury, months before Phase II of this trial. As set forth in jury instruction No. 25 of Phase II, without objection from State Farm:

> You are instructed that a previous jury in this case has found that a substantial likelihood exists that excess verdicts in favor of Slusher and the Ospitals would be rendered against Curtis Campbell in the Cache County case, and that State Farm acted unreasonably in not settling both of these claims against Mr. Campbell before the Cache County verdicts. This means that State Farm breached its duties of good faith and fair dealing and its fiduciary duty to Campbells to settle the claims against Curtis Campbell within the policy limits.

¶ 110 Given State Farm's success in getting a bifurcated trial, and given the jury's finding of bad faith in the Phase I proceeding in which the Campbells were not permitted to introduce any institutional evidence on its claim-handling procedures, there is simply no basis for State Farm's present Rule 404(b) objection that in Phase II of the trial, "plaintiffs' trial counsel . . . invited the jury to draw from this [other acts] evidence precisely the inference that Rule 404(b) forbids -- that State Farm must have committed an act of bad faith in the present case because it had done so in many other cases." State Farm Reply Memorandum at 27-28. Such an inference was logically impossible in Phase II, as the parties stipulated to the jury (in instruction No. 25) that State Farm's breach of good faith duties had already been established in Phase I.

¶ 111 Thus, State Farm's success in achieving bifurcation of the threshold bad faith issues from the institutional case is itself sufficient to dispose of State Farm's present arguments. However, other major points are also worth adding in putting to rest State Farm's contention that it was treated unfairly by this Court's evidentiary rulings.

B. State Farm Sought Bifurcation on the Premise That Phase II Would Involve a Broad Scope of Institutional Evidence

¶ 112 Although bifurcated trials are the exception, at State Farm's insistence and over the strenuous objections of the Campbells, the Court allowed the bifurcation order of the prior judge, Judge Rokich, to stand, requiring the Campbells' claims to be tried in a bifurcated proceeding to separate juries. State Farm designed the bifurcation, getting precisely what it asked for in terms of what would be covered in Phase I, and what would be reserved for Phase II. Although the Court recognized that it was excluding evidence relevant to the Phase I issues, it narrowly restricted the proof to the evidence of State Farm's treatment of the Campbells, with no consideration of State Farm's general claim-handling procedures, and the Campbells were required to establish State Farm's breach of good-faith duties under these heavy evidentiary restrictions.

¶ 113 From the Court's earliest involvement with this case, it understood that the purpose of Judge Rokich's bifurcation order was to separate the so-called "bad-faith phase"

(Phase I) from what the parties termed the "institutional phase" of this trial (Phase II). Strenuously opposing bifurcation, the Campbells repeatedly urged this Court to reconsider Judge Rokich's decision. State Farm prevailed in its bifurcation arguments largely by pointing out that Phase II, covering the instructional evidence, would involve a very lengthy trial, as it would deal with State Farm's corporate policies and practices – so that bifurcation would save substantial resources in the event that the jury found no bad-faith claim handling. Thus, State Farm was fully aware, when it successfully urged this Court to retain the bifurcated trial plan and keep the threshold bad-faith issue separate from the complex institutional issues, that the Campbells' institutional case would be relevant to the issues to be decided in Phase II, if the jury returned a verdict for the Campbells in Phase I. The importance and necessity of the evidence introduced by the Campbells in their Phase II institutional case was well understood throughout this case. There is simply no basis for any claim of prejudice or unfairness by Stare Farm, and it was necessary to admit such evidence in order to afford the Campbells a full and fair opportunity to litigate their claims under applicable law.

C. The Institutional Evidence Was Necessary to Explore Why State Farm Would Mistreat the Campbells

¶ 114 The central issue in Phase II, as this Court understood it from the beginning, was the question of why did State Farm do what it did to the Campbells – why it committed the bad faith claim handling that led to the excess verdict that presented the Campbells with the possibility of financial ruin and all the attendant consequences. The possible answers were: (1) it was inexplicable, there is simply no explanation; (2) it was a foolish or honest mistake; or (3) it was a result of two corporate policies, one to encourage or enforce a requirement that State Farm's claims handling be improperly used to

enhance corporate profits, and second to conceal this profitable policy to evade legal and regulatory accountability for it.

¶ 115 Stated simply and in short form that third possibility was the plaintiffs' institutional case, the record evidence in support of which is detailed at length in the Campbells' Statement of Facts and Memorandum Regarding Punitive Damage Issues at 12-143, and in their Surreply Memorandum at 13-41, and which the Court has summarized in Part I, above. It would be fair to say that the Campbells' ability to articulate this third theory has improved, or perhaps the Court's understanding of what they have been saying all along has been clarified. But the essence of the institutional case has been in this case as long as this judge has been assigned to it.

D. The Court Invested a Great Amount of Time Carefully Crafting Evidentiary Rulings That Were Fair to Both Sides

¶ 116 In spite of the arguments that State Farm made in successfully obtaining bifurcation (urging deferral of the institutional case until Phase II), after the Campbells prevailed in Phase I, State Farm argued that little, if any, of the institutional evidence that had been contemplated for Phase II should be admitted. As a result, during the several months between Phase I and Phase II, a large number of motions *in limine* and other requests were made to the Court seeking pretrial resolution of evidentiary issues concerning the scope of Phase II. These matters were thoroughly and extensively briefed and argued in numerous hearings before this Court involving multiple motions *in limine* and several hearings. Shortly before Phase II began, the Court conducted four days of hearings addressing, *inter alia*, State Farm's arguments that the institutional case was inappropriate for consideration by the jury under Rules 404(b) and 403. The Court carefully considered

and ruled on each of the numerous pending motions *in limine*. All told in this case, the Court conducted more than ten pretrial hearings involving evidentiary issues in whole or in part, consuming more than fifteen days.

¶ 117 Contrary to State Farm's current assertions, the Court did not permit the Campbells boundless freedom in presenting their Phase II evidence. Substantial amounts of evidence that the Campbells strongly desired to present were excluded by the Court, while the use of much of their other evidence was markedly restricted. At the conclusion of this extensive pretrial effort, the Court issued several detailed orders that established evidentiary parameters tightly controlling the range of proof that would be allowed the Campbells in establishing their claims. Even where the Court indicated its intent to receive general categories of evidence, State Farm retained its right to object to specific items of evidence when proffered at trial, as well as its right to contest admissibility under Rule 403 of specific items of evidence. *See* Order Denying Various Motions of State Farm to Exclude Plaintiffs' Evidence, filed May 28, 1996 (hereinafter "Rule 404(b) Order"), at 5, ¶ 9. The trial record reflects that State Farm exercised these rights on many occasions during the trial.

¶ 118 The Court believes that its rulings, particularly its Rule 404(b) Order, were sound and stands by them and incorporates them by reference, to the extent not modified by later orders and not inconsistent with this order. In those orders, this Court found the Campbells' institutional case, involving evidence of State Farm's overall claims handling policies and practices, to be highly probative, indeed essential to numerous material issues before the jury including: (1) intent, (2) reckless disregard, (3) absence of mistake, (4) agency, (5) existence of outrageous conduct, (6) existence of a wrongful pattern or practice underlying State Farm's torts, and

(7) reprehensibility of any such wrongful pattern or practice. *See* Rule 404(b) Order, at 2-3 ¶ 3 (evidence "necessary" for consideration of punitive damages, as factfinder "must" consider this evidence under *Crookston*): *id.* at 3 ¶ 4 (evidence "must" be admitted to permit plaintiffs to prove "each element of fraud"); *id.* at 3 ¶ 5 (evidence "must" be admitted to permit plaintiffs to prove elements of State Farm's intent relevant to claim of intentional infliction of emotional distress); *id.* at 3 ¶ 6 (evidence "directly bears on" State Farm's defense "that Campbell consented to the trial of the underlying case" and that it "relied in good faith on Wendell Bennett's opinions"); *id.* at 4 ¶ 7 (finding that evidence "is helpful to overcome the disadvantage" to plaintiffs of the evidence destroyed by State Farm, and that plaintiffs "would be prejudiced" by exclusion of such evidence); *id.* at 4 ¶ 8 (concluding that, on balance, "the pattern and practice evidence is of high probative value and importance to plaintiffs' claims, and that serious prejudice to plaintiffs would result if such evidence were excluded. The court further finds that the probative value is not outweighed by the danger of unfair prejudice or confusion"). As discussed above, these grounds for admission clearly fit within the "other purposes" permitted under Rule 404(b).

¶ 119 Having made those rulings, the Court allowed State Farm to aggressively cross-examine the Campbells' witnesses, to present evidence in its own defense from a wide array of experts testifying to the absence of such policies, and otherwise to attempt to establish the baselessness of the Campbells' institutional case. For their part, the Campbells argued that the bad-faith handling of the *Campbell* file was best explained as a consequence of institutional policies established long ago at State Farm to enhance corporate profits by pressuring and enticing claims adjusters systematically to deny policyholders their insurance benefits, and then to seek to evade accountability for that profit scheme through a wide range of illegal and

unfair tactics. The Campbells presented compelling evidence that supported this view, as already summarized.

¶ 120 The Court believes that the institutional case was fully and fairly tried. Both sides had an ample opportunity to present their evidence on whether the Campbells' institutional explanation of what produced the injury to them was to be believed or not to be believed. And the Court confident that the rulings it made allowing the Campbells' institutional evidence to come in were proper.

E. Much of The Evidence of Which State Farm Now Complains Was Admitted Because of State Farm's Strategy at Trial

¶ 121 It is worth emphasizing that, in permitting the Campbells to put on their institutional case, the Court tightly controlled the range of proof that would be allowed, limiting the Campbells in their case in order to evidence directly relevant to the nature of the auto company's claim-handling policies and practices. In support of State Farm's assertions that this Court presided over a "boundless inquisition into [its] business practices," State Farm Opening Memorandum at 32, and what amounted to a "kitchen-sink" approach to the case, State Farm Surreply Memorandum at 48, State Farm points to a variety of other evidence ultimately involved by the jury which considered broader aspects of State Farm's business practices. However, State Farm does not properly acknowledge that this evidence to which it now objects was admitted: (a) only as rebuttal or impeachment evidence (to attack the credibility of State Farm experts who purported to be extremely knowledgeable and would certainly have been aware if State Farm was engaging in such practices); or (b) as a result of various evidentiary doors that were opened by State Farm during trial, that the Court had previously closed (in some

instances State Farm proceeded to open such doors even after being explicitly warned by the Court during the trial that such would be the consequence); or (c) because State Farm's own counsel elected to admit the evidence; or (d) without objection by State Farm when the evidence was offered.

¶ 122 With respect to the impeachment and rebuttal evidence in particular, the Court put State Farm on notice prior to the start of Phase II that this type of evidence would be permitted in response to the testimony of expert witnesses whom State Farm planned to call, and whom had been previously deposed. *See* Order Regarding Evidence of Other Cases, filed May 28, 1996, at 2-4. In spite of this ruling, State Farm chose to put on several insurance regulators whose level of knowledge of State Farm's business operation was extremely open to question.

¶ 123 The testimony offered by one of these witnesses, Mr. Rogers (from State Farm's home state of Illinois) is illustrative. Mr. Rogers testified on direct examination that if State Farm were involved in any wrongful denial of insurance benefits or other unfair practices, it would "absolutely" have come to his attention, but that it had not – so that State Farm must have blameless corporate policies. He declared "I find it incomprehensible to come to any other conclusion." 24 Tr. 52. He asserted that he routinely reviewed pending court cases against insurance companies, including State Farm, and testified that he knew of no bad-faith verdicts, punitive damage verdicts, or class actions (except a very old California one) against State Farm. 24 Tr. 66-71. He further testified that he did not know of a single claimant who had ever been treated unfairly by State Farm. 24 Tr. 63. State Farm elicited similar testimony from other regulators, who testified that, having attended a number of national meetings with regulators from around the country and having spoken by telephone with

regulators from all over the country, they were unaware of any concerns over State Farm's practices or of even a single claimant who had been treated unfairly. 24 Tr. 92; 25 Tr. 108; 30 Tr. 57.

¶ 124 In advance of Phase II, the Campbells disclosed that they had uncovered a large number of cases from around the nation involving court decisions in which Stare Farm had been found guilty of deceptive practices, bad faith and/or liability for punitive damages, as well as a number of class actions challenging State Farm's claim-handling practices. Being fully aware of this, State Farm still chose to present testimony from Mr. Rogers and other regulators essentially claiming that, if there were any concerns over State Farm's practices, they would be aware of them and that they were not aware of any such concerns. Mr. Rogers, the Illinois regulator, was confronted with two recent, highly publicized, class actions from Illinois involving many thousands of people who claimed to have been mistreated by State Farm's claim-handling practices, where in State Farm had agreed to make payments to members of the class. A former Texas regulator was confronted with appellate decisions from Texas in which State Farm had been found liable for fraud, bad faith, deceptive trade practices and/or had been held liable for punitive damages. 25 Tr. 128-29. Other cases were also properly used to impeach and rebut the contentions of these and other witnesses.

¶ 125 State Farm also relied on its employees as part of its defense to the Campbells' institutional case. State Farm's own regional vice president (the highest ranking official at State Farm to testify at trial), Buck Mosklaski, gave a glowing testimonial concerning the fairness of State Farm's claim-handling practices. He also testified that in his entire career he had learned of no insured or claimant who had ever been treated unfairly by State Farm. During discovery, he had been

formally designated as a Rule 30(b)(6) witness to testify about State Farm's awareness, if any, of punitive damage awards, and he swore under oath (speaking on behalf of himself and State Farm) that he was not aware of any punitive damage awards or bad faith verdicts. Much as with the regulators, this witness was impeached with appellate decisions from Texas affirming punitive damage and bad faith verdicts, which involved State Farm's conduct during the same time he was deputy regional vice president in Texas, with responsibility for claim handling.

¶ 126 Having been fairly forewarned, State Farm chose to present such witnesses, having been alerted in advance that this evidence would be met with a considerable body of impeachment and rebuttal evidence from the Campbells. The record will reflect that nevertheless, the Court restricted the manner in which impeachment evidence came in, and how it was used.

F. The Court's Rulings Are Not Contrary to The Doporto Decision

¶ 127 In its attack on this Court's evidentiary rulings, State Farm places great emphasis on a criminal case involving a sex offender, *State v. Doporto*, 395 P.2d 484 (Utah 1997). *Doporto* does not bear the emphasis that State Farm suggests. *Doporto* has been clarified in a subsequent Utah Supreme Court case, *State v. Pearson*, 943 P.2d 1347 (Utah 1997). In *Pearson*, the Utah Supreme Court upheld an aggravated murder conviction against a Rule 404(b) objection, in spite of the trial court's admission of evidence of prior involvement with the Indiana police, including references to a drug sale. The Court found such evidence properly admitted as relevant to motive and intent. Further the Utah Supreme Court has recently approved an amendment to Rule 404, effective February 11, 1998, returning the law to its pre-*Doporto* status. The Court

addresses the *Doporto* point to cover any possibility that this recent change, might be held to operate purely prospectively, even with respect to trials (like this one) held before *Doporto* was handed down.

¶ 128 The standard for admissibility set out in *Doporto*, assuming that it fully applies to this civil case (which seems doubtful), has easily been met here. The *Doporto* opinion indicates that the Court should first determine that the "other acts" evidence is actually necessary, i.e., "it cannot be used to prove a point not really contested." *Id.* at 491. Second, the evidence must be strongly probative of a material issue: "a probativeness that cannot serve as a ruse for showing that the defendant's propensity is such that he is likely to have committed the kind of crime charged." *Id.* Such findings were at the heart of this Court's pretrial rulings. For example, in the Rule 404(b) Order of May 28,1995, the Court made the following finding among others:

> 8. Acting upon State Farm's motion, this case was bifurcated, and plaintiffs' evidence in the first trial was substantially limited. Though the Wrongful Pattern and Practice Evidence was relevant to plaintiffs' claims of bad faith under Rule 402, Utah Rules of Evidence, at State Farm's request the Court excluded the evidence with the expectation that it would be considered in the second trial. This was the primary reason for bifurcating this case for trial. Even with this restriction of evidence (which primarily benefited State Farm), the jury in the first trial found against State Farm on all questions on the verdict. In light of this verdict, the Court finds that the pattern and practice evidence is of high probative value and importance to the plaintiffs' claims and serious prejudice would result if such evidence were excluded. The Court further finds that the

> probative value is not outweighed by the danger of unfair prejudice or confusion.

¶ 129 "While the Court, obviously, did not have the *Doporto* decision (handed down after trial) in mind in making these findings, as a result of the extensive pretrial evidentiary proceedings, this Court's consideration of the Rule 404(b) issues more than met the *Doporto* standard. It was this Court's view, which has only been bolstered by witnessing the evidence at trial, that the so-called "other acts" evidence was not only necessary, but essential, to the several vigorously contested material issues discussed above. This evidence was plainly neither offered nor received for a purpose prohibited under Rule 404(b), nor as a ruse for such an improper purpose, but was strongly and highly probative of the several material issues central to the resolution of this controversy previously discussed. The Court finds that its rulings and findings in this case were wholly consistent with both the letter and the spirit of *Doporto*. This Court's careful pretrial weighing of evidentiary issues not only satisfied, but far exceeded, anything that Doporto might require.

G. Individual Rulings On Evidence Must be Viewed in the Full Context of the Case and Not in Isolation

¶ 130 In one of its orders issued on May 28, 1996, just before Phase II of the trial, the Court made observations that merit repeating in connection with this Rule 404(b) analysis:

> [None] of the court's other orders relating to rulings on motions *in limine* and other evidentiary matters can properly be considered in isolation. During the course of this case, the court has been called upon to decide a large number of evidentiary issues. Various means have been used by the court and the parties to present and treat these

matters including numerous motions *in limine*, numerous hearings (including some evidentiary hearings) and extensive briefing and oral argument.

* * * *

A large number of evidentiary issues have been strenuously argued and resisted on both sides of this controversy, with the court having ruled both for and against each side on numerous occasions. In doing so, the court has spent many days carefully considering the issues, the equities and the interests of justice and fairness on both sides. The court has worked very hard to exercise its best judgment and discretion in ruling on very difficult and complex issues in balancing the various interests and considerations in having this case and the parties' claims and defenses presented fairly and even-handedly. In doing so, the court has kept in mind the "big picture" in this case, has been mindful of past rulings on evidentiary issues and past positions taken by the parties so that the specific rulings on various evidentiary issues and other issues relating to trial of this matter fit within an overall approach consistent with fairness and equity.

Accordingly, it would not be accurate or fair to view any evidentiary or other discretionary ruling of this court in isolation or in connection with a small number of other rulings. To accurately assess this order or any other evidentiary or trial related orders, such order should be viewed in connection with all of the other evidentiary or trial-related orders that have been issued by this court in this case. (See Order Excluding Testimonies of Ivie, Glauser and Thornley.)

¶ 131 These observations are equally applicable to the rulings made during Phase II of the trial, and to this Court's post-trial rulings, as a general matter.

¶ 132 This Court is satisfied, particularly with the added benefit of hindsight, that its evidentiary rulings were sound, that the case was fairly tried, and that State Farm's motion for a new trial based on its evidentiary rulings concerning the scope of the Phase II evidence should be denied.

III.

CONCLUSION

¶ 133 It is not feasible for the Court to set forth all of the extensive evidence in the case which supports the Court's findings, conclusions and order. The record is simply too large. The Court has attempted to describe the most significant evidence in summary form with only a partial description of the mass of specific evidence.

¶ 134 Based on the foregoing findings and conclusions, the Court is satisfied that there was substantial evidence sufficient to support a jury finding of the requisite mental state and all other elements of a punitive damage award, as well as the amount of punitive damages awarded by the jury. Additionally, the Court has independently reviewed the punitive damage award in light of the evidence, and concludes that the award was justified under the first six factors of *Crookston*. However, based solely upon *Crookston*'s ratio factor, as set forth above, the Court grants State Farm's motion for a remittitur of the punitive damage award down to an amount of $25,000,000.00. In the event that the Campbells had chosen not to accept the remittitur, the Court would alternatively have granted State Farm's motion for a new trial.

¶ 135 The Court also rejects State Farm's arguments with respect to the scope of the evidence admitted in Phase II for the reasons stated.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. State Farm's motion for judgment n.o.v. on punitive damages is hereby denied.

2. State Farm's motion for a remittit

EXCERPT OF TRANSCRIPT OF PRETRIAL MOTION HEARING OF MAY 22, 1996 – STATE FARM'S MOTION FOR RECONSIDERATION

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,	)	
Plaintiff,	)	
vs.	)	CASE NO. 890905231
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Defendant.	)	

* * * * *

BEFORE THE HONORABLE WILLIAM B. BOHLING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SALT LAKE CITY, UTAH

MAY 22, 1996

PRETRIAL MOTION HEARING
CASE NO. 890905231

* * * * *

MR. BELNAP: Thank you. Your Honor, Mr. Schultz did lay out the facts of this case, and we provided you a copy, so I'm going to just try to just briefly hit the points in this case that we think apply to the issues that have been brought before Your Honor, and the evidentiary matters pertaining to the scope of the claims of pattern and practice that have been alleged in this case, and what the outlying and accompanying issues that relate to that are.

In this case, the BMW case, the Supreme Court indicated that the award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire nation.

"When the scope of the interest in punishment and deterrence that an Alabama court may properly consider is properly limited, it is apparent, for reasons that we shall now address, that this award is grossly excessive."

We would like to start, our position that this case from our Supreme Court starts with that proposition, that they analyze the conduct in the light of the same conduct. And what we have in this Campbell case is conduct alleged against State Farm that we, State Farm, made an improper decision to try a case that should have been settled.

We believe, under the standards of BMW, that that is the conduct that needs to be examined, is in a third-party context. The decision that State Farm made was to proceed and try a case that a jury of this state has now said there was a substantial likelihood of an excess verdict, and State Farm was not reasonable in making that decision.

It is our position, Your Honor, that under BMW, that if you are going to look at other conduct on the part of State Farm, outside of Utah in terms of pattern and practice, that the

court in BMW would say that that, under certain circumstances, may, in fact, be relevant, but it has to tie back to the same type of conduct.

In this case, as Your Honor is well aware from the arguments on the various motions from both sides, there has been conduct that has allegedly been said that we want to put it in – and I'm speaking for the plaintiffs – in as evidence of State Farm's nationwide pattern and practice of allegedly cheating, or allegedly not fulfilling its obligations to insureds or to others, of issues pertaining to property damage, of issues pertaining to medical expenses, of issues pertaining to first-party claims for certain types of coverage, like uninsured motorist and other coverages that would be a first-party case.

And we would submit that that does not fall within the same conduct test that the Supreme Court used in looking at the BMW case.

We would also submit that, with respect to what occurred in this case, that, under the laws of the state of Utah, when an insurance policy is written, State Farm does take on the obligation of the decisions that are made with respect to that coverage, and that's where the fiduciary duty arises. When State Farm has the right to control whether the case does or doesn't settle, the fiduciary duty arises.

Now, that does not mean that a decision to go ahead and try the case is an unlawful decision under the standards of the BMW case. It may mean that State Farm made a mistake, it may mean, as the jury decided in Phase 1 that State Farm was not reasonable in doing so, but to equate that with an indicia of unlawfulness, quote-unquote, certainly does not apply.

So if we go back to this case, where BMW indicated that it contested the underlying judgment because, in part, the evidence from other states, and the evidence of other conduct outside of the state of Alabama was not appropriate and not relevant, the court acknowledged this argument, and said, "While we do not doubt that Congress has ample authority to enact a policy for the entire nation, it is clear that no single

state could do so, or even impose its own policy choice on neighboring states."

The court went on to state, "Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual states from imposing undue burdens on interstate commerce. While each state has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire nation."

In one of the concurring opinions it was stated that, "Yet, here Alabama expects jurors to act at least a little like legislators or judges, for it permits them, to a certain extent, to create public policy, and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case."

In summary, Your Honor, we believe BMW stands for the fact that you need to look, in examining this pattern and practice evidence, at the core conduct. And that the pattern and practice evidence, as a second point, then needs to relate to that core conduct. And if evidence comes in from out-of-state activity, that it is related to that core conduct.

And that there has to be, the third point we get from the case, is that there has to be a reasonable relationship to the harm to the plaintiff in terms of the punitive award that's being asked for. And that the evidence then be considered in determining the punitive award and its relationship to the conduct at issue, and that the plaintiff has the burden.

As set forth in this case, the BMW court, in the Supreme Court, placed the burden on the plaintiff, which would be the same in this case, that the experts that are used in this case may not come in and simply say, "I've reviewed a number of files, I've reviewed their policy manuals, I've reviewed claim memos, I've reviewed other things, and I believe State Farm has a nationwide pattern and practice, from their manuals and materials, to cheat people, to do people out of property damage

claims, to do people out of first-party claims, to do people out of all of these other things."

To meet that burden there would have to be a showing that the law that's being relied on from each of those states foundationally creates an unlawful act.

There would have to be a further showing that it comes out of the same conduct that this case, the Campbell case, arises out of, and there would have to be a foundation laid that it's appropriate and relevant in view of the statements of this court about the confines of the jury in this state making policy for other states.

There would have to be a showing that, for instance, just as an example, Your Honor, when we filed the motion for summary judgment in this case before Judge Rokich and the bad faith case was dismissed, the majority of the jurisdictions across the country, with the exception of one, held in their state laws that when an underlying judgment, excess judgment had been paid, as a matter of that state's law, there was no claim that could arise for a bad faith claim in favor of the insured, or of a third party in some states that allow a direct action.

To then say that, given that state of law, that State Farm could not proceed under its policy to decide and try this case, when that was the state of the law, and continues to be the state of the law, would require a witness to come in and say, on a foundational basis, state by state, that, "State Farm does this in this particular state, I know they do this, and here's the law of that state that they have allegedly violated and done unlawful things in."

Therefore, we would ask, respectfully, that this court consider the breadth of the rulings on the motions in limine that have been made in the following areas.

We filed a motion in limine to exclude pattern and practice evidence in non-bodily injury cases. We filed, secondly, a motion in limine that was part of that, but argued separately in it, that the testimony of Bruce Davis be excluded,

since his testimony dealt with property damage adjusting, and claims relating to property damage issues.

We, thirdly, filed a motion in limine to exclude other cases that plaintiffs' experts would rely upon that are non-third-party cases, that are first-party, such as uninsured motorist or medical pay, or those types of cases.

We also, there are related motions that carry over, fourthly, to witnesses like Ina DeLong, Calvin Thur, and any other witness who is going to be relying upon core conduct or core facts, if I could put that term to it, Your Honor, that would be unrelated to the core conduct that's alleged in this case that State Farm dealt with and was guilty of bad faith for having done so.

And we would ask that Your Honor reconsider its rulings in those areas in light of this BMW decision. Thank you.

MR. CHRISTENSEN: Your Honor, I had an interesting evening reading this case. I know it was new to all of us yesterday. As I read the case, I was struck with the fact that a clear message in the case, I'll not get into specifics, but a clear message in the case seems to be that courts in punitive damages cases should receive more evidence, not less. And that the court seems to be inviting an even broader area of evidence than the current rulings of the court would indicate. And so it's curious to me that State Farm gets a different reading from this case.

First of all, the case should be put in context. This is a United States Supreme Court decision, the United States Supreme Court is not sitting as a traditional appellate court would, reviewing the trial, and all of the evidentiary rulings and so forth. They're dealing on a Constitutional issue.

And the Constitutional issue is, was the excess verdict, here, grossly excessive? Not surprisingly, they concluded that $4 million because a car had been repainted, even reduced to $2 million in punitives, was too much.

THE COURT: Was this a 5-4 decision?

MR. CHRISTENSEN: Yes. What they did hold by way of substance was—— And Your Honor, I'm not sure how familiar you've had a chance to be, or how much you've acquainted yourself with the details of this case.

THE COURT: I've tried to read it. I can't say I've read it with the kind of concentration that I'd want to read a case to really feel like I fully understood it, but I have read the case.

MR. CHRISTENSEN: This is the first case that the United States Supreme Court has struck the amount of punitive damages. They upheld a $10 million punitive damage award in a recent case, the TXO case, which they refer to extensively, and others. And they seem to be concerned about a couple of issues, or several. But these are ones that I can pinpoint.

One is, you had a man who bought a new car. It's a BMW. Apparently the car had been subjected to some acid rain while it was being transported, and BMW had repainted part of the car because the acid rain had tarnished the finish.

The owner of the car couldn't even tell it had been repainted. It looked great to him, he was happy for nine months. He went to a detail shop, to a professional who looked at it, who was going to spruce up his car, and the professional said, "You know, I think this car's been repainted." And it turned out it had.

It turns out that there are statutes around the country, and I wasn't aware of this until this case, but that indicate that if the cost of repairing a new car is not over a certain percent of its value, that that doesn't need to be disclosed. And that varies from state to state. And BMW, I think their policy was, if it didn't get over, I think it was 3 percent of the value of the car, they fixed it, and didn't feel any need to tell the buyer, or even the dealer.

The court pointed out that there was nothing about this that affected the safety of the car, or even the function of the car, or, as they said, even the appearance.

BMW didn't hide any of the evidence. They kept records of the numbers of cars they've done this with. Those were produced. And it turned out this had been done to approximately 1,000 cars.

An expert said this reduced the value of the car by 10 percent, and it was a $40,000 car, so that was 4 grand. So the damages awarded to this plaintiff were $4,000.

The plaintiff's counsel then proposed to the jury by way of punitives that they take the thousand cars around the country, multiply that by $4,000, and come up with $4 million.

There was evidence in the case that what BMW was doing was legal in states across the country. And the court said, first of all, even with the Alabama Supreme Court remitting punitives from $4 million to two, that was still a 500-to-1 ratio of the $4,000 compensatory damages to the punitives. And they said that's too high. And we suspect it would be. They didn't say it would always be too high, but they said that, certainly under these facts, it would be.

The second thing that they said was that this mathematical computation approach which awarded specific amounts of punitive damages for BMW's conduct in states where that very conduct was lawful, and where it was committed in a state where it was lawful, wasn't right. They said one state can't punish for conduct that was committed in another state when it was lawful in the state where it was committed. There's no big surprise there.

They left open the issue of whether a state can punish for conduct in another state that's unlawful.

Now, they mentioned, in determining the issue of excessive, an excessive punitive damage award – And I would submit, Your Honor, we don't have that issue in this case. As plaintiffs, we hope some day we will have to argue that issue. But right now, the issue that was dealt with in the BMW case

is not an issue in this case at this point. So the case really isn't on point, but we want to make sure we stay on the right side of the Constitutional mandates.

They said, in determining whether something was excessive, they listed three factors. The first factor is the degree of reprehensibility of the misconduct. And I'm going to treat that one before I go to the other two factors, because I believe that the guidance the court gives on that suggests that the kind of evidence that we're proposing in this case is exactly the kind that should be received.

They point out that there's reprehensible conduct of different degrees. They say this principle reflects the accepted view that some wrongs are more blame worthy than others. They say such things as violent crimes are worse than non-violent crimes, for example. And it's interesting, they point out that non-disclosure that a car's been repainted, on the reprehensibility scale, isn't that bad of misconduct.

Elsewhere in the opinion it's suggested by one of the justices that an example of highly reprehensible conduct would be someone cheating an elderly couple out of their life savings through deceit, which gets much closer to the Campbell case.

So they say you have to look at how reprehensible the conduct is. They point to the TXO decision that points out that trickery and deceit is a highly reprehensible form of misconduct.

The flagrancy of the misconduct is one that they point to. They then point out, Your Honor – Let me get to some of the other factors. They point out that, and I'm now reading from page 10, "Certainly evidence that a defendant has repeatedly engaged in prohibited conduct, while knowing or suspecting that it was unlawful, would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."

THE COURT: Is this what they're calling recidivism?

MR. CHRISTENSEN: It's part of that discussion, yes. It's all part of this discussion on how, the degree of reprehensibility.

They point out, Your Honor, in footnote 21, they first say that it's not proper to use a multiplier where you're multiplying, in this case, the number of cars they do this in other states where it was legal, that wasn't right. But it then says, "This does not mean," I'm looking at footnote 21, "that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, as we stated in TXO," and I won't give the full cite, there, "and discussed more fully infra, pages 16 to 19, such evidence is relevant to the determination of the degree of reprehensibility of the defendant's conduct."

And so as you – The principle is, the more reprehensible the conduct, the higher punitive damage award is justified. And to determine the degree of reprehensibility, the court, and I'm going to repeat this again, says that, "Evidence describing out-of-state transactions is relevant in this kind of a case," as they said in TXO, that "such evidence is relevant to the determination of the degree of reprehensibility of the defendant's conduct."

THE COURT: What page are you on? I want to be sure of that.

MR. CHRISTENSEN: That's page 8, footnote 21. And this opinion, the footnotes are in the body. I assume that's because this is some sort of a preliminary readout.

THE COURT: No, I understand that.

MR. BELNAP: I think what he just read from, Your Honor, is on page 10 of the opinion.

MR. HUMPHERYS: We may have a different copy, Your Honor.

MR. SCHULTZ: You're not using the copy we gave you?

MR. HUMPHERYS: We'd better match those if we can. We've got a different copy than the court's.

MR. CHRISTENSEN: Apparently we have a different service.

MR. SCHULTZ: It's on page 10, Your Honor.

THE COURT: I'm sure I've got the one that State Farm brought over.

MR. CHRISTENSEN: I thought I did, too, but apparently I don't.

MR. SCHULTZ: Footnote 21, right at the bottom of page 9 on the right-hand side.

THE COURT: Okay, so that last statement, "To the contrary is stated in TXO and discussed more fully, such evidence is relevant to the determination of the degree of reprehensibility of the defendant's conduct." That's what we're talking about, right?

MR. CHRISTENSEN: Yes, Your Honor. And if I could, for a minute, digress to the TXO opinion, and I'm looking at page 2722. That was a case, Your Honor, where the court upheld the U.S. Supreme Court, and it's a 1993 case. The U.S. Supreme Court upheld a verdict where the actual damages were $19,000, and the punitive damages were $10 million. It's a lengthy opinion. If I could, if the court would like I'll explain very briefly what the case was about.

THE COURT: Please.

MR. CHRISTENSEN: That was a case where TXO was a company involved in some sort of oil gas business. They had a contract with Alliance. The deal ended up not looking as profitable for them as they'd hoped, and so they filed a suit to try to get out of the contract.

It was determined that the basis for the suit was not well founded, it was not in good faith.

Alliance hired attorneys and defeated the lawsuit, and they spent $19,000 in attorneys fees.

They, then, subsequently obtained a $10 million punitive damage verdict against TXO for its misconduct in trying to get out of a contract without a good faith basis to do it.

The court said that this very large punitive damage award, compared to the $19,000 actual damage, was justified because of the potential harm. It pointed out that if TXO had succeeded, it would have done several million dollars' worth of harm to the plaintiff, and so even though the plaintiff's actual loss was only nineteen, the fact that there was serious potential harm was considered, and they upheld the award.

Now, they also said in the case, "TXO," and I'm looking at footnote 28 on page 2722, "TXO also contends that the admission of evidence of its alleged wrongdoing in other parts of the country –

THE COURT: You say you're on footnote 28?

MR. CHRISTENSEN: On the TXO case, Your Honor.

THE COURT: I'm sorry.

MR. CHRISTENSEN: I've got everybody confused now. It says, "TXO also contends that the admission of evidence of its alleged wrongdoing in other parts of the country, as well as the evidence of its impressive net worth, led

the jury to base its award on impermissible passion and prejudice."

It goes on to say, "Under well-settled law, however, factors such as these are typically considered in assessing punitive damages."

On that same page, 2722, "The punitive damage award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery, and deceit, and petitioner's wealth, we're persuaded that the award was not so grossly excessive as to be beyond the power of state law to allow."

So they expressly referred to a pattern of deceit, dishonesty, and expressed that it's well-settled law that factors such as wrongdoing, or it just said, in that case there was an admission of evidence of alleged wrongdoing.

Getting back to BMW and the element of degree of reprehensibility, that factor that needs to be looked at. Other things that the court has pointed to as things that should be considered, and they are pointed out in some instances by saying, "The BMW case lacks this, therefore the award should be lower."

They say, "In the BMW case, the record discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive such as were present in Haslop and other Supreme Court cases sustaining a large punitive damage verdict, and TXO."

So they indicate that on this same issue of the degree of reprehensibility, the jury should hear evidence of whether there were deliberate false statements, acts of affirmative misconduct, or concealment of evidence.

It says, going on, on page, my page 11, "But the omission of a material fact," which is what happened here, is BMW just didn't say anything, "but the omission of a material fact may be less reprehensible than a deliberate false statement. Particularly when there's a good faith basis for believing that no duty to disclose exists."

Your Honor, before I leave this factor of the degree of reprehensibility, let me point the court to a couple of other statements. I'm now moving into some of the other opinions. There were actually four opinions in this case, two dissenting, one concurring, and one main opinion.

I've already mentioned the most serious kinds of misrepresentations, the example is giving, tricking the elderly out of their life savings. In a dissenting opinion, written by Justice Scalia with Justice Thomas joining, he says, "Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community sense of indignation or outrage expressed in the punitive damage award."

In other words, he's saying, when you cut through all of the dicta, what this really means is the court just thought it was too much.

He also goes on and says, points out the court's decisions, "If a person has been held subject to punishment because he committed an unlawful act, the degree of his punishment assuredly can be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not. Criminal sentences can be computed, we have said, on the basis of information concerning every aspect of a defendant's life."

MR. SCHULTZ: Was that the dissenting opinion, Roger?

MR. CHRISTENSEN: Yes, but he cites the Williams versus New York case. Finally, and I'll get back to the next factor, Your Honor. The second dissenting opinion of Justice Ginsberg points out that sales nationwide, the Alabama Supreme Court said were admissible as to the issue of a pattern and practice of such acts. There was no error, the court reiterated, in the admission of evidence that showed how pervasive the non-disclosure policy was, and the intent behind BMW and its adoption of it.

He goes on and says, "That determination comports with this court's exposition," and he cites the TXO case. And so the court, I think I've probably given close to ten examples, now, where the court indicates that looking at the reprehensibility, the degree of reprehensibility, you look at their acts, unlawful or not, inside and outside the state.

The recidivism citations, Your Honor, that you mentioned, were also dealing with this issue. And they point out that they have repeatedly held that a court, in punitive damages or criminal punishment, can look at wrongs committed in other jurisdictions.

Bottom line is, and it sounds like a fine distinction, but I think it's what this case stands for, is you cannot award money by a mathematical computation. You cannot award punitive damages in one state for conduct that was lawful in another state, where it was committed.

They leave open the question of whether you can punish in a state for conduct that was unlawful in the state where it was committed, and Your Honor, it seems clear from this decision that you can award punitive damages for conduct that was unlawful in the state where it was committed, even though it was not committed against the plaintiff. That, to me, expands the notion of punitive damages, rather than contracts them.

Other factors that they say needed to be looked at are the disparity between the harm – and Your Honor, this is important – the disparity between the harm or potential harm suffered by the plaintiff. They point out in this case, his safety wasn't put at risk or anything else. Purely his car was worth a little less money.

And the third factor is the difference between this remedy and the civil penalties authorized or imposed are incomparable cases.

I've already mentioned the ratio. They said they have upheld a 10-to-1 ratio in TXO, and they stress potential harm, again. They have said there's no bright line, no bright mathematical line in the Constitution on ratio.

It gets back to looking at all of the factors. The more reprehensible, the more widespread, the more calculated and deceitful the conduct is, the higher the ratio can be.

THE COURT: I assume your argument is that if those things are all material, or relevant in determining punitive damage awards, then it's all admissible before the court in a case which that's the focus of the trial?

MR. CHRISTENSEN: Yes. BMW does not stand for the proposition you don't look at conduct in other states. It stands for the proposition, you can't punish for conduct in other states that was lawful in those states, and number two, if you're going to have a punitive damage determination, you'd better have substantial evidence of how widespread this is, how reprehensible it is, whether it's part of a pattern and practice, and all these factors I've mentioned, so that the jury, the trier of fact, and later the judge, if necessary, has the evidence to determine whether it was excessive, or whether it was in line.

THE COURT: Mr. Christensen, Mr. Belnap advises me that most of the courts, and what most of the other jurisdictions of this country have a rule that if you pay the excess, then there's no bad faith case. How does that, if at all, play to the implications of BMW and the use of other state evidence in a case in which those are the rules in other states, and not here?

MR. CHRISTENSEN: Mr. Humpherys had the opportunity of briefing and arguing that issue on the appeal in this case. I think maybe he could address it better than I could.

THE COURT: All right.

MR. HUMPHERYS: That was raised on the appeal, and there were only a handful of cases that even addressed the issue. And it is true, there were, I don't know, as I recall, two

or three cases that supported that contention. And others that did not support that contention. But the vast majority of the cases have not addressed it.

The Court of Appeals and the Supreme Court, by denying cert, which there was a petition for rehearing, or not rehearing, but for certiorari, explained that they felt that those one or two cases that said there was not a cause of action was not well founded, was not based on good policy, and they rejected that line of cases.

THE COURT: Does that argument have anything to do with the argument here, though? I mean in other words, I see Mr. Belnap using what value those cases have to, I think, address an analogous argument to what the Supreme Court did here, where they said, "Well, there's all these state statutes that make non-disclosure lawful, and therefore to use general pattern evidence in which there may be a statute in which the conduct here is not unlawful would be inappropriate."

MR. HUMPHERYS: Let me make a point, and I'll sit back down and let Roger finish his argument. But those cases – and it's been a while since I've read them, I admit that – my memory of them, and I spent a great deal of time reading them and studying them at the time, was that it was that there wasn't reprehensible or wrongful conduct, or violations of unfair claims practices.

The courts in those jurisdictions simply held that from, that they would not recognize a cause of action in behalf of the plaintiff, not that there wouldn't be conduct which was actionable through the standards such as the unfair claims practices or the national standards or something else.

For example, through the insurance commissioners in regulating the companies. That was not even mentioned. There was not any issue that I'm aware of that I recall in any of those cases regarding a finding that there was fraud in the cases, that there was deceit, or scheme, or practice, or anything

else. They simply said that if a payment is made on or before the time that the final judgment is affirmed, then we're not going to allow punitive damage, excuse me, a bad faith action to proceed.

Now, there's still a bad faith action. In other words, they're still recognizing the wrongful conduct, because they're saying, what we're doing is we're saying they can correct the wrongful conduct by making payment of the judgment, and we're satisfying the issue at that point.

THE COURT: Are there any states where legislatively they have eliminated the bad faith insurance cause of action?

MR. HUMPHERYS: I know of none, and even in those couple of cases that were cited by State Farm in their brief, even those cases recognized the bad faith, had the judgment not been paid. So in other words, they're recognizing the wrongful conduct.

THE COURT: I understand your response.

MR. HUMPHERYS: I didn't mean to interrupt his argument.

MR. HANNI: Your Honor, may I just say something about that one point?

MR. CHRISTENSEN: Can I finish –

THE COURT: Let him finish. I was going to allow you another chance to respond.

MR. CHRISTENSEN: And I'm not going to go much longer. There's an important distinction, here. As I read the case carefully last night, it became clearer to me, that is they're saying you can't punish for conduct that was legal in another

state, but you do hear evidence of it. State Farm is trying to use this case to say you don't hear the evidence, when the case says just the opposite.

Footnote 21, I've read twice, says that very thing. That the fact that you don't award money for it doesn't mean that the jury doesn't hear it. They say, on the contrary, they do. It is relevant to the issue of how reprehensible the conduct is. And it's certainly relevant to the issue of how much it will take to deter it in the future.

And so proving that the conduct is unlawful in the state where it was committed is necessary if you want to seek punishment for it, but not if you simply want to introduce the evidence.

THE COURT: I think I have your argument.

MR. CHRISTENSEN: Okay.

THE COURT: Mr. Hanni, did you want to –

MR. HANNI: Could I just talk about that one point, and then Mr. Belnap will finish for us.

In the case in the Court of Appeals, Your Honor, what Mr. Belnap was talking about there is this. In the course of briefing our, in the course of filing our motion for summary judgment before Judge Rokich, our argument was that if you never get a final judgment in a res judicata sense, not in a final, in the sense that it's appealable, then a cause of action for bad faith because of an excess verdict never comes into existence.

There was one case, and if my memory serves me correctly, one only, and it's Larabrew was the name of it, out of the Ninth Circuit. And that Larabrew was a federal case, it was based on California cases. There were four or five, if my memory is right, cases from other states that supported our position, namely if you step up to bat and pay the excess verdict – And that was what we thought we had done.

We said we were going to pay it in '86 if it gets affirmed on appeal, and we did pay it before it became final in a res judicata sense. And it was satisfied. So what I'm saying here, is, our Court of Appeals, prior to that time we had no law one way or another. And the only law out there was Larabrew that supported the decision of the Court of Appeals.

There were four or five other cases out there that supported our position. And Judge Rokich was persuaded they were right, but the Court of Appeals rejected those cases and relied on the ninth circuit case.

And that is what we're talking about here, is there was no law in the state of Utah that said that if you stepped up to bat and paid the excess verdict, that you could still be liable for refusal to settle within the policy limits. This is the first pronouncement of that, and the cases that had been decided said you couldn't ever be sued for bad faith, therefore there couldn't be any punitive damages at all. And that's the point of it. And that will be a point, of course, in the course of this case. It should go to the question of, certainly, the conduct of State Farm, and how egregious it was, and so on.

THE COURT: Thank you.

MR. BELNAP: Perhaps Mr. Christensen misunderstands State Farm's argument. I thought that I made it clear that we stated the BMW case does say that you can take evidence from outside the state under certain conditions. We then referred Your Honor to what I call the core conduct, or the same conduct that the court talked about, however, in limiting that evidence. And the same thing, if I could refer Your Honor to page 13 of the opinion that we gave you, and let's talk about the TXO case.

THE COURT: Where are you on page 13?

MR. BELNAP: Down in the bottom left-hand corner.

THE COURT: I see it.

MR. BELNAP: It says, "We relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded." That difference suggested that the relevant ratio was not more than 10 to 1. And then looking at the footnote that follows that, note 34, it goes on to state, "While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents in terms of reduced or eliminated royalty payments, bad petitioner succeeded in its illicit scheme."

That is our point, Your Honor, and I'd like to take you back, please, to page 9 of the decision, and I'd like to refer right here, Your Honor.

THE COURT: I see it.

MR. BELNAP: Where it says, note 21, which is the note that Mr. Christensen has been focusing on. Where the Supreme Court specifically says, "The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire nation. When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent, for reasons that we shall now address, that this award is grossly excessive."

And that's what leads into footnote 21, is the same conduct analysis that I just read from page 13 in the TXO case. And that's the reason for my argument out of the chute this afternoon, that what we need to look at is what happened in the Campbell case, what State Farm allegedly didn't or did do, and evidence that goes to that same conduct in pattern and practice, and not allegations like Mr. Davis would talk about, of talking about property damage adjustment of appearance allowances that are not unlawful, of after-market parts that are not unlaw-

ful, about alleged discrimination when dealing with Vietnamese and other people, about medical claims, about these other areas that don't arise out of the same conduct.

And the case itself focuses on the conduct of this failure to disclose the repainting of the vehicles. So as we stated, Your Honor, to say that, as counsel for the plaintiff indicated that this case stands for the fact that more evidence should come in than less, if there's more evidence that falls into the standard of the burden of proof on the plaintiff, that it arises out of the same conduct, that it arises, that the witness can say that it was allegedly lawful, or unlawful, and that that witness knows the standards of that state and can talk about that state's law, then maybe there will be more or less evidence. But it has to fall within the same conduct and the parameters of this decision.

MR. CHRISTENSEN: Your Honor, could I respond very briefly?

THE COURT: I'm going to rule, Mr. Christensen. I think I've given you ample time to argue your point, and I want to get on to the other point.

MR. CHRISTENSEN: The comment I wanted to make was not more argument. It was simply, it appears to me that we can treat the concerns of BMW with appropriate jury instructions, and with how punitives are argued. And that's, we really ought to be mindful of this case when the jury instructions are prepared, but I don't think it goes to the exclusion of evidence.

THE COURT: Well, the court's had a chance to hear a great deal of argument on this case, and also had a chance to review it itself.

The court notes that the Supreme Court states that the purpose of the case is, "Because we believe that a review of this case would help to illuminate the character of the standard that will be identified Constitutionally excessive awards of

punitive damages." That is what the court took as the fundamental theme in the way this case was developed by the justices.

And curiously, the justices were at a 5-4 split on a punitive damage award that was 500 to 1 in the ratio to the actual damages. And that, in the court's view, is certainly much more permissive than what the court understands the Utah Supreme Court to allow, at least presumptively, under the Crookston case, and therefore what the Supreme Court offers on that basis is not, in the court's mind, particularly helpful.

It is always interesting to hear other attorneys' view of what a case stands for. The court found very different perspectives from the two lawyers that have argued before the court today, and respects their legal assessments.

The court does take, from this case, frankly, some heart in what the court would view in the case as being the broad range of issues that are permissibly introduced into evidence as bearing upon the issue of punitive damages, in that the report made some rulings that the court found difficult to make, and allowed some evidence in that was strongly resisted by the defendants. But the court doesn't find anything in this case to suggest that the court's rulings were inappropriate, and it is going to deny the motions to reconsider based on it.

The court would note the number of factors, I think Mr. Christensen pointed out a number of them in his argument, as identified in this opinion, that are properly considered by a jury in looking at the issue if punitives are appropriate. And many of those factors identified, at least by allegations of the plaintiff, are evidence in this case. And I think by the court's rulings, some of these areas will be developed in this case.

The court does believe that the point Mr. Christensen was making at the end is one the court's very mindful of. Before the case is submitted to the jury, that the court has to be mindful of the way in which the issues are presented to the jury, and following a jury award the court has not in any sense, hopefully, indicated an inclination to abdicate its responsibility

to consider issues of remittitur or whatever, should that issue arise, based, not only on this case, but the cases that have been decided in the state of Utah, and what the appropriate punitive damage awards are, should any be entered by a jury.

Let's get on with the motion to stay. I think that that's something that we need to discuss before we finish today. Mr. Belnap, are you arguing that?

MR. BELNAP: Your Honor, Rule 8 of the Utah Rules of Appellate Procedure provides that a stay of a judgment or order of the trial court pending appeal or petition must ordinarily be made in the first instance in the trial court.

And at this time we would move the court for an order staying the scheduling order in this case, which would be the start of this trial on June the 4th, so that we might have an opportunity for the Supreme Court to review specific issues dealing with the issues pertaining to the plaintiff's motions in limine 15, 16, and 20, dealing with evidence of the agreement of June of 1983, and from which this court granted motions excluding evidence from attorney witnesses Mr. Slagle, Mr. Nebeker, and Mr. Bennett, talking about collusion, or the matters that were argued to the court.

We would also ask the court for this stay of the scheduling order and the trial so that the Supreme Court could review the exclusion of the three attorney witnesses, Mr. Ivie, Mr. Glauser, and Mr. Thornley, who the court has excluded, since they have not been willing to divulge their attorney-client privileged files, and waived that privilege to allow the plaintiffs to look at the files under the subpoenas that were served.

As a related issue to that, those witnesses – I don't intend to reargue this – but those witnesses were offered and needed by the defendant for several reasons, including to talk about their practice in the handling of State Farm cases, and Mr. Thornley's experience as a plaintiff's lawyer in dealing with State Farm over twenty-plus years. And also to rebut the inferences and evidence that may come into this case if the

foundation is laid for the Excess Liability Manual, that states certain things about attorneys' handling of cases, so that they would have an ability to say that that is not how they have handled cases in the state of Utah.

So, to summarize, Your Honor, we would ask that a stay of the scheduling order take place so that the Supreme Court could have an opportunity to review those rulings, and that we could get in front of them this issue so that judicial resources, if those, if there is a disagreement with this court's position, in a month-plus trial, are not wasted on a subsequent appeal if those rulings are later deemed not to be correct.

Thank you.

MR. HUMPHERYS: Was it just those two orders that you were talking about regarding the stay?

MR. BELNAP: Yes. So that I'm clear on this, Your Honor, it would be the exclusion of the evidence about the June, '83 agreement that's called collusion, and I've referenced their motions, it would be relative to the exclusion of the other three attorney witnesses, Ivie, Glauser and Thornley that I've talked about. And related to that, as I've indicated, would be the issue of the denial of our motion to exclude the Excess Liability Handbook that makes further the importance of those witnesses to be able to testify. And those two are related, if that handbook is deemed to come in, their testimony is even more important. We don't think the handbook should come in, so that would be argued in the same context, and we would ask for the stay for that reason.

Now, I believe that in the discussions which started our hearing this afternoon, the court has asked the parties, in good faith, for a trial plan, and I don't want to go back into those discussions, because it sounds like you have solicited from us, in good faith, a plan to proceed so that the parties can get their case presented within the discretion that this court does have in terms of handling the case.

THE COURT: I don't know if you're asking whether I'm acting in good faith, or whether you're acting in good faith, Mr. Belnap. I assume that I don't need to defend my good faith. I'm asking you, because I am seriously interested in that.

MR. BELNAP: I'm not sure what, that you must have misinterpreted what I was saying.

THE COURT: You said something about the court asked in good faith for a plan.

MR. BELNAP: Asked us to, in good faith –

THE COURT: That's what you're saying?

MR. BELNAP: – present a plan so we can deal with –

THE COURT: That's exactly what I did, Mr. Belnap, and I am most interested in receiving that. And let me say that, just so it's clear to you on that, I don't want to be diverted from this one point, but the – I would like the plan – I would like it in the context of the actual schedule, so that it's really reduced to that point. I don't want you to say, "We need five more days." I mean I want you to do what Mr. Humpherys has done, now go back over it and flesh out that schedule with what you think you need in order to complete your case. That's what I'm suggesting that I want from you, so I will have in front of me an actual, you know, proposed schedule, as opposed to simply a statement, "We need more time," or something like that.

MR. BELNAP: And I will do that. And we will submit that to Your Honor with – I need to state, however, as you are aware from the last couple of days, there have been issues discussed where we're still waiting for a designation of videos that are going to be used, designation of the exact – I mean we have some PP&Rs that they've listed in their 3,000 pages of

authentication documents, but if there's other PP&Rs, that may include potentially some other witnesses.

The cases, the other cases were held by Your Honor to be used in rebuttal, and we don't know which ones of those cases they may or may not use. And so there is going to have to be some understanding when we submit our plan in compliance with Your Honor's direction that there will be some open areas in that, that we can't yet address.

THE COURT: I understand, and I think that part of the process is that it's to be a process of working between counsel to develop the plan that will ultimately be submitted to the court. What you're telling me today is you need more time, and there's no way you can present it in the time I've allotted. And now I'm inviting that to be built into what you're doing so I can look at that, and give plaintiffs a chance to look at it and respond, and we'll see where we go from there.

But I'm not going to hold you to a designation to precise minutes in a day, but I am asking you to give it your best shot, and only leave out those things that you don't have basis right now to be able to supply.

MR. HANNI: Your Honor, may I just make, before Mr. Christensen, in the event the Supreme Court looks favorably on an interlocutory appeal in this case, or an extraordinary writ, one other issue that we would ask them to review would be standing of Mrs. Campbell to even recover in this case. Because that's been ruled on before by the trial court, as well as the Court of Appeals, but has not been by the Supreme Court.

THE COURT: I think you did raise that yesterday with me.

MR. HANNI: I did, Your Honor. And we would, in addition to what Mr. Belnap talked about, we would ask the

Supreme Court at that time to rule on that, too, if they grant an interlocutory appeal.

MR. BELNAP: Mr. Schultz reminded me of one thing that is implicit in those specific orders that we referenced, and that is, given this BMW decision, in terms of the pattern and practice issues that it bears on, that would follow through our arguments in our petition in terms of those points, Your Honor.

THE COURT: I think you certainly have available to you this decision, for whatever benefit it can give you. You brought it to the court's attention, the court's read it, we've heard argument, the court's ruled on it. As far as I'm concerned, that decision is fair game, and I think that you're more than entitled to rely on it in any way you wish to do so.

* * * * *

DENIAL OF PETITION FOR REHEARING BY THE UTAH SUPREME COURT DATED DECEMBER 4, 2001

IN THE UTAH SUPREME COURT

Curtis B. Campbell and
Inez Preece Campbell,

Plaintiffs/Appellees
and Cross/Appellants,

v. Case No. 981564-SC

State Farm Mutual Automobile,
Insurance Company,

Defendant/Appellant
and Cross/Appellee

ORDER

This matter is before the court upon a petition for rehearing, filed on November 16, 2001.

IT IS HEREBY ORDERED that pursuant to Rule 35 of the Utah Rules of Appellate Procedure the petition for rehearing is denied.

Dated this 4th day of December, 2001.

For The Court:

Michael J. Wilkins
Justice